

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MAR 25 2002

In the Matter of	)	
	)	
Implementation of Further Streamlining	)	CC Docket No. 01-150
Measures for Domestic Section 214	)	
Authorizations	)	

### REPORT AND ORDER

**Adopted:** March 14, 2002

**Released:** March 21, 2002

By the Commission: Commissioner Copps approving in part, dissenting in part, and issuing a statement.

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### I. INTRODUCTION

1. In this Order, the Commission adopts rules to govern and streamline review of applications for section 214 authorization to transfer control of domestic transmission lines.<sup>1</sup> Specifically, for the reasons set forth below, we implement streamlining procedures that will allow domestic telecommunications carriers to qualify for expedited review of their applications. By adopting these rules, we seek to reduce unnecessary regulatory burdens on carriers while increasing the predictability and transparency of our review.

2. This Order takes several significant steps to lessen the burden on carriers seeking authorization to acquire domestic transmission lines. We establish a 30-day streamlined review process that will presumptively apply to domestic 214 transfer applications meeting specified criteria, and that will apply on a case-by-case basis to all other domestic section 214 applications. Our rules currently contain no guidance concerning the information that carriers should provide in domestic section 214 applications. We adopt rules in this Order to provide that guidance. We also ease filing burdens by adopting rules that enable carriers to file a single document with the Commission that combines both domestic and international section 214 applications.<sup>2</sup> We eliminate application filing requirements for all *pro forma* transactions, and we require simple post-transaction notifications to the Commission only for certain transfers in bankruptcy proceedings. We also define *pro forma* transactions in the domestic section 214 context in a manner that is consistent with how we define *pro forma* transactions involving other types of Commission authorizations. In addition, we modify our filing requirements with regard to asset acquisitions, by requiring that they now be treated as transfers of control. Overall, the steps we

<sup>1</sup> See 47 U.S.C. § 214.

<sup>2</sup> We note that approval of consolidated applications will not necessarily be jointly conducted among the International and Common Carrier Bureaus, as different rules and policies apply to the analysis of transfers of domestic and international section 214 authorizations.

take in this item will add predictability, efficiency, and transparency to the Commission's review process, and will greatly improve our current transfer of control procedures, which carriers have sometimes found confusing, cumbersome, and overly burdensome to navigate.

## II. EXECUTIVE SUMMARY

3. The Order institutes two basic rules: a Filing Rule and a Streamlining Rule.<sup>3</sup> The following is a summary of these rules and of other actions taken in this Order.

- **Joint Applications.** The Filing Rule provides carriers with domestic and international operations the option of filing one document that combines both their international and their domestic section 214 transfer applications.<sup>4</sup>
- **Required Information.** The Filing Rule sets forth the information that applicants must provide in their domestic section 214 applications, whether filed separately or in combination with an international section 214 application.
- **30-Day Review Process.** The Streamlining Rule adopts a streamlined review process in which certain applications are automatically granted 30 days after public notice unless a carrier is otherwise notified by the Commission. All domestic section 214 applications will be eligible for streamlined processing, regardless of the carriers and types of transactions involved.
- **Presumptive Categories.** The Streamlining Rule lists categories of applications that would be presumptively accorded streamlined treatment, such as those involving only non-facilities-based carriers; certain types of incumbent independent local exchange carrier (LEC) transactions; combinations of interexchange carriers with low combined market shares; and proposed transactions where one party provides no domestic telecommunications services. Streamlined processing of applications not falling within a presumptive category will be determined on a case-by-case basis.
- **Removal from Streamlining.** Under the Streamlining Rule, the Commission, acting through the Common Carrier Bureau, can remove an application from streamlined processing at any time. To provide further guidance, the Streamlining Rule gives examples of circumstances that would warrant removal of a transaction from streamlining.

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<sup>3</sup> See adopted rules in App. B. The Streamlining Rule is new section 63.03 of our rules, and the Filing Rule is new section 63.04.

<sup>4</sup> We note, however, that this Order only addresses the streamlining of domestic section 214 transfers of control. Nothing in this Order modifies the rules or policies governing the transfers or assignments of international section 214 authorizations.

- **Pro Forma Transactions.** To promote consistency in the Commission's licensing and authorization rules, the Streamlining Rule defines *pro forma* transactions in a manner that is consistent with the definition used by the Commission in other contexts to permit carriers to consummate *pro forma* transactions without prior Commission approval.
- **Asset Acquisitions.** The Order harmonizes the treatment of asset acquisitions with the treatment of acquisitions of corporate control.
- **Deleted Rules.** The Order deletes sections of the Commission's rules that we have determined to be obsolete.

### III. BACKGROUND

4. Under section 214 of the Communications Act, carriers must obtain a certificate of public convenience and necessity from the Commission before constructing, acquiring, operating or engaging in transmission over lines of communication, or before discontinuing, reducing or impairing service to a community.<sup>5</sup> In considering such applications, the Commission has employed a public interest standard under section 214(a) that involves an examination of the potential public interest harms and benefits of a proposed transaction.<sup>6</sup> In 1999, the Commission adopted the current version of Rule 63.01, granting all carriers blanket authority under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line.<sup>7</sup> The blanket authority in Rule 63.01, however, does not extend to the transfer of lines resulting from an acquisition of corporate control.<sup>8</sup> The Commission found that acquisitions of corporate control often raise serious public interest concerns regarding the state of competition following a proposed acquisition or merger. The Commission also noted that such acquisitions often are contested and draw significant public comments that the Commission is bound to consider.<sup>9</sup>

<sup>5</sup> 47 U.S.C. § 214(a).

<sup>6</sup> See, e.g., *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20063, para. 157 (1997).

<sup>7</sup> See *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11372, para. 12 (1999) ("1999 Streamlining Order"); 47 C.F.R. § 63.01(a). Blanket authority for domestic telecommunications carriers is a deregulatory measure that allows carriers to construct, operate, or engage in transmission over lines of communication without filing an application with the Commission for "entry" certification under section 214. *Id.*

<sup>8</sup> 47 C.F.R. § 63.01(a).

<sup>9</sup> 1999 Streamlining Order, 14 FCC Rcd at 11374-75, para. 18.

5. Accordingly, with respect to acquisitions of corporate control, the Commission decided that carriers must file a section 214 application with the Commission and obtain Commission approval prior to consummating a proposed transaction. As the Commission explained in the *1999 Streamlining Order*, acquisitions under section 214 can be either acquisitions of assets – such as by purchase or lease of lines – or acquisitions of corporate control, such as acquisitions of equity ownership (e.g., stock or partnership interests), veto power, or a controlling interest in a board of directors. The Commission reasoned that the magnitude of corporate acquisitions and their potential effect on competition distinguished them from acquisitions of assets.<sup>10</sup> Therefore, the Commission decided to include asset acquisitions under blanket authority – which does not require a section 214 transfer application to be filed – while concluding that “corporate acquisitions should not be covered by blanket authority.”<sup>11</sup> Because carriers also file applications pursuant to section 214 to discontinue operations,<sup>12</sup> under the terms of the *1999 Streamlining Order*, a carrier that sells its assets is currently required to file a discontinuance application with the Commission and notify all affected customers that it is discontinuing service.<sup>13</sup>

6. In the Notice of Proposed Rulemaking (Notice) adopted in this proceeding last July, the Commission tentatively concluded that a substantial number of transactions do not raise public interest concerns and should be granted on an expedited basis.<sup>14</sup> Therefore, the Commission sought comment on ways to streamline its review process for these transactions. The Notice set forth various streamlining models that the Commission could adopt for domestic section 214 transfers of control, such as the “discontinuance” model<sup>15</sup> or the international section

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See 47 C.F.R. § 63.71.

<sup>13</sup> *1999 Streamlining Order*, 14 FCC Rcd at 11374, para. 18, n.55.

<sup>14</sup> See *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, 16 FCC Rcd 14109, para. 20 (2001) (Notice).

<sup>15</sup> Notice at para. 26. Applications to discontinue domestic services normally are automatically granted after a specified time period: 31 days for non-dominant carriers, and 60 days for dominant carriers. See 47 C.F.R. § 63.71. We use the term “dominant” here to describe the regulatory classification of providers of domestic telecommunications services; the term “dominant” as used in this Order does not refer to any potential dominance arising from a foreign carrier affiliation. Under existing domestic common carrier regulation, incumbent LECs are generally treated as dominant carriers, absent a specific finding to the contrary for a particular market. See *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360 (rel. Dec. 20, 2001) (*Dom/Non-Dom Notice*). As dominant domestic carriers, incumbent LECs are subject to tariff filing, tariff support and pricing requirements. See *id.* at n.8. For a discussion of how the Commission distinguishes between dominant and non-dominant carriers, see *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report (continued....)

214 streamlining model.<sup>16</sup> The Commission also invited comment on the types of proposed transactions that should qualify for streamlined treatment, and the information that carriers would need to provide in their applications to establish eligibility for streamlining.<sup>17</sup> Because it is not always possible to predict which applications will raise competition concerns or other public interest concerns, the Commission tentatively concluded that it should reserve authority to remove applications from streamlined review, as it does when handling applications for transfers of control of international and wireless licenses and authorizations.<sup>18</sup> The Commission also asked about miscellaneous issues such as the appropriate treatment of carriers entering into bankruptcy proceedings and applicants facing imminent business failure, and whether the Common Carrier Bureau should establish a scheme for the review of *pro forma* transactions, *i.e.*, those changes in corporate form that do not result in a change in ultimate control of the authorized carrier.<sup>19</sup>

7. With respect to applications accompanied by a waiver request, the Commission tentatively concluded that it should decide on a case-by-case basis whether streamlined treatment should apply.<sup>20</sup> The Commission also sought input on whether the blanket authority established for beginning new operations or transferring assets should be extended to transfers of control of non-dominant carriers.<sup>21</sup> Finally, the Commission requested comment on whether the existing

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and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier* proceeding).

<sup>16</sup> Grant of streamlined international section 214 applications for authority to transfer control are effective 15 days after public notice of an application unless the Commission removes an application from streamlined processing. See 47 C.F.R. § 63.12. In addition, we note that the Commission has instituted streamlined procedures for compliance with the slamming rules in handling the carrier-to-carrier sale or transfer of subscriber bases. See *2000 Biennial Review - Review of Policies and Rules Concerning Unauthorized Changes of Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, 16 FCC Rcd 11218 (2001) (adopting 47 C.F.R. § 64.1120(e)).

<sup>17</sup> Notice at para. 30.

<sup>18</sup> Notice at para. 32. See, e.g., 47 C.F.R. § 63.12(c)(4) (stating that streamlined procedures for international section 214 applications shall not apply where “[t]he Commission has informed the applicant in writing, within 14 days after the date of public notice listing the application as accepted for filing, that the application is not eligible for streamlined processing”).

<sup>19</sup> Notice at paras. 20, 27.

<sup>20</sup> *Id.* at para. 31.

<sup>21</sup> *Id.* at para. 33.

regulatory distinction between asset acquisitions – which result in discontinuance applications by the selling carrier – and stock acquisitions, which require transfer of control filings, may provide an incentive for some firms to structure transactions to avoid rigorous Commission review of matters affecting competition.<sup>22</sup>

#### IV. FILING RULE

8. Our new filing rule establishes the minimum information required in domestic section 214 transfer applications and creates a procedure that permits carriers to file domestic and international section 214 applications in a single document. In this section, we describe this new rule and discuss our ongoing initiatives to improve applicants' access to electronic filing procedures.

##### A. Application Format and Filing Alternatives

9. The Commission's rules currently require two separate applications under section 214 where a proposed transaction involves both international and domestic transfers of control.<sup>23</sup> Based on the Commission's experience with these applications and our discussions with interested parties, it appears that confusion exists regarding precisely what information should be contained in a domestic section 214 application. Although the Commission has adopted rules regarding the content of international section 214 applications, there are no rules specifying the content of domestic applications. Therefore, the Commission sought comment in the Notice on what information should be contained in domestic section 214 transfer of control applications.

10. In comments, carriers requested that the domestic and international section 214 transfer of control applications and approval processes be combined, stating that by making the requirements for domestic transfer of control applications mirror the requirements of the international section 214 transfer of control applications, the Commission would minimize the administrative burdens associated with transfers of control and would facilitate timely closing of transactions.<sup>24</sup>

11. We agree in substantial measure with these commenters, and establish a new domestic section 214 application filing procedure to permit parties to file joint applications for international and domestic section 214 transfers of control.<sup>25</sup> Under this new application

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<sup>22</sup> *Id.* at para. 25.

<sup>23</sup> See 47 C.F.R. §§ 63.01, 63.18.

<sup>24</sup> CompTel Comments at 5; ASCENT Comments at 4. CompTel and ASCENT urge that parties be allowed to file one application for both international and domestic section 214 transfers of control.

<sup>25</sup> At this time, the Commission is not considering a consolidated application process for wireless and wireline applications due to the amount of technical information contained in the wireless applications that is not required for section 214 transfer of control applications. Additionally, the consolidation of the international application and the domestic application processes seems inherently reasonable because both types of wireline applications consist of predominantly the same information and are presented to the Commission in essentially the same format.

procedure, applicants seeking approval for both domestic and international section 214 transfers of control can file the international section 214 application with an attachment that contains the information required for the domestic section 214 application that is not already included as part of the international section 214 application.<sup>26</sup> Applicants must file copies of the joint applications with both the International Bureau and the Common Carrier Bureau, together with filing fees that satisfy (and are in accordance with filing procedures applicable to) both sections 1.1105 and 1.1107 of our rules.<sup>27</sup>

12. CenturyTel has commented that the Commission should consolidate the application review and issue approvals in a consolidated fashion.<sup>28</sup> Additionally, CenturyTel states that the Commission should provide applicants with one point of contact for all pieces of the application. Verizon asserts that review by multiple bureaus should not extend the review time for an application, and that a cross-bureau task force should issue a consolidated approval from the Commission.<sup>29</sup>

13. We are not persuaded that either a cross-bureau task force or a mandatory consolidated final action on multi-bureau applications would be viable or appropriate. First, the approval of international and domestic applications implicates both different rules and policies. For example, consideration of World Trade Organization (WTO) status would affect analysis of international section 214 applications, while dominant carrier safeguards may affect consideration of domestic section 214 applications. Therefore, we find that actions upon joint international and domestic applications need not automatically be done by means of a single document, but instead may be effected either through separate actions or through a consolidated action, as may be appropriate under the individual circumstances.

14. We also decline to establish a cross-bureau task force or a single contact point for the two separate applications. Because the new rules serve to coordinate and consolidate cross-bureau applications where appropriate, we find that creation of a cross-bureau task force is not necessary.<sup>30</sup> When multiple applications relating to the same transaction are filed with the Commission, the Commission's current practice is for the affected bureaus to coordinate among themselves and with the Transaction Team in the Office of General Counsel with the goal of ensuring that our review of the applications is consistent, efficient, and transparent.<sup>31</sup> In several instances, we note that the affected bureaus have issued joint public notices, in which points of

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<sup>26</sup> That supplemental information is more specifically identified in paragraph 16, *infra*.

<sup>27</sup> 47 C.F.R. §§ 1.1105, 1.1107.

<sup>28</sup> CenturyTel Reply Comments at 6.

<sup>29</sup> Verizon Comments at 4.

<sup>30</sup> See Verizon Comments at 4.

<sup>31</sup> *FCC Implements Predictable, Transparent and Streamlined Merger Review Process*, Public Notice (rel. Jan. 12, 2000).

contact within the staff have been provided, applications have been consolidated into a single pleading cycle, and the bureaus have issued joint decisions disposing of applications relating to the same transaction.<sup>32</sup> While we continue to evaluate the handling of joint applications and to explore ways in which we can further improve and streamline our processes, we decline to adopt measures that would make sweeping internal administrative changes at the same time as we adopt, for the first time, significant changes to effect the streamlining of domestic section 214 applications for transfers of control.

15. Applicants choosing to file a joint domestic and international section 214 transfer application still will be required to submit separate copies of the joint application and separate filing fees for each application in accordance with filing procedures in sections 1.1105 and 1.1107 of our rules. After the Commission receives the applications and confirms that the filing fees have been properly submitted, the domestic and international section 214 applications will be assigned separate file numbers. Although the Common Carrier Bureau will process the domestic section 214 application and the International Bureau will process the international section 214 application, we expect that these bureaus will continue to coordinate among themselves and with other bureaus to ensure that the Commission's review related to the transfer applications is consistent, efficient, and transparent.

16. In order to ensure that the Commission has adequate information about domestic applications, when an application for a domestic section 214 transfer of control is submitted as part of a joint application with an application for an international section 214 transfer, the domestic attachment to the joint application should include the following: 1) a description of the transaction; 2) a description of the geographic areas in which the transferor and transferee (and their affiliates) offer domestic telecommunications services, and what services are provided in each area; (3) a statement as to how the application fits into one or more of the presumptive streamlined categories in section 63.03 or why it is otherwise appropriate for streamlined treatment; 4) identification of all other Commission applications related to the same transaction; 5) a statement of whether the applicants are requesting special consideration because either party to the transaction is facing imminent business failure; 6) identification of any separately filed waiver requests being sought in conjunction with the transaction; and 7) a statement showing how grant of the application will serve the public interest, convenience and necessity, including any additional information that may be necessary to show the effect of the proposed transaction on competition in domestic markets.

17. We find that permitting applicants to file their domestic and international applications in a single document is consistent with the public interest. Combined applications will reduce the paperwork burden on applicants because carriers will not need to repeat the same

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<sup>32</sup> See, e.g., *Commission Seeks Comment on Application for Consent to Transfer Control Filed by Chorus Communications, Ltd. and Telephone and Data Systems, Inc.*, Public Notice, DA 01-715 (rel. Mar. 20, 2001); *Common Carrier Bureau and Wireless Telecommunications Bureau Grant Consent for Transfer of Control of Licenses and Authorizations of Berkshire Cable Corporation d/b/a Berkshire Long Distance to Citizens Communications Company*, Public Notice, DA 01-1788 (rel. July 26, 2001).

information in two different applications as they have done in the past. Certain applicants may not hold international section 214 authorizations or may prefer to file separate applications for their domestic and international section 214 authorizations. In such circumstances, applicants that file a stand-alone domestic section 214 transfer of control application should include in their application all the information required to be included in a domestic application that is filed as part of a joint application, as set forth above, as well as the following additional information: 1) the name, address and telephone number of each applicant; 2) the government, state, or territory under the laws of which each corporate or partnership applicant is organized; 3) the name, title, post office address, and telephone number of the officer or contact point, such as legal counsel, to whom correspondence concerning the application is to be addressed; 4) the name, address, citizenship and principal business of any person or entity that directly or indirectly owns at least ten percent of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest one percent); 5) certification pursuant to 47 C.F.R. sections 1.2001 through 1.2003 that no party to the application is subject to a denial of federal benefits pursuant to section 5301 of the Anti-Drug Abuse Act of 1988.<sup>33</sup> Much of the information we require to be filed in a domestic 214 application is aimed at determining eligibility for streamlining under the Streamlining Rule we adopt in this Order. Other information, such as other Commission filings related to the same transaction, will help facilitate coordination of the Commission's overall review process.

## **B. Electronic Filing**

18. Improving access to electronic filing systems is an ongoing objective of the Commission. We note that the International Bureau plans to implement an on-line filing process for international section 214 transfer applications and we do not expect our new filing rule to delay that process. Once implemented, applicants will be able to file international section 214 transfer applications on-line, but may not be able to file their domestic section 214 attachment on-line. Thus, until electronic filing for domestic section 214 transfer applications is implemented, applicants using electronic filing will be unable to file a combined domestic and international section 214 application. We will, however, permit applicants to file a separate domestic section 214 application that consists of a printed copy of the electronically filed international section 214 application and the requisite attachment containing the additional information required for the domestic application. The Commission will continue to work towards an electronic filing solution that combines both the international and domestic applications, and also allows the fees for both authorizations to be paid electronically.

## **V. STREAMLINING RULE**

### **A. Notice and Comment Period**

19. In the Notice, the Commission sought comment on the appropriate review and comment period for streamlined applications, and whether the review length should be linked to

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<sup>33</sup> See 21 U.S.C. § 853.

the carrier's status as dominant or non-dominant.<sup>34</sup> In response, some commenters proposed that the Commission adopt notice and comment rules similar to the streamlined rules for international section 214 applications for transfers of control, which provide for public notice but do not feature a formal comment cycle.<sup>35</sup> Under the proposed procedures, applicants would be required to state that the transaction qualifies for streamlining pursuant to the adopted rule, and the Commission would then issue a public notice stating that 30 days after the public notice date (60 days for dominant carriers) the application would be deemed granted.

20. After considering the proposals we have received, and in light of current streamlined procedures for other types of transactions, we conclude that when the Commission, acting through the Common Carrier Bureau, determines that applicants have submitted a complete application qualifying for streamlined treatment,<sup>36</sup> it shall issue a public notice commencing a 30-day review period to consider whether the transaction serves the public convenience and necessity.<sup>37</sup> Parties will have 14 days to file any comments on the proposed transaction, and applicants will be given 7 days to respond. All such comments shall be filed electronically, and shall satisfy such other filing requirements as may be specified in the public notice. We will then determine as early as possible, but no later than 30 days after the public notice is released, whether the transaction requires further analysis and, if so, shall remove the application from streamlining.<sup>38</sup> Unless an application is removed from streamlined processing, the applicants will be permitted to transfer control of the domestic lines or authorization on the 31st day after the date of public notice listing the application as accepted for filing.<sup>39</sup> We believe that handling applications in this way will significantly reduce regulatory burdens on carriers, and

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<sup>34</sup> Notice at para. 26.

<sup>35</sup> For example, CompTel argues that applicants should file one application that the Commission would automatically grant, whether it involves dominant or non-dominant carriers, 14 days after the public notice, absent further Commission action. CompTel Comments at 5. As is the case with international section 214 applications, applicants would begin operation on the 15<sup>th</sup> day under the CompTel proposal. *See also* WorldCom Comments at 4-5, 8; AT&T Comments at 5, 13; ASCENT Reply Comments at 6.

<sup>36</sup> We note that the Common Carrier Bureau does not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines. *See* 47 C.F.R. § 0.291(a)(2).

<sup>37</sup> We note that Title III of the Communications Act requires a 30-day petition period for transfers of control involving Commission wireless licenses.

<sup>38</sup> The Commission reserves the right to request any further information deemed necessary to make a determination on the application.

<sup>39</sup> The filing of comments or a petition to deny will not necessarily result in the application being deemed ineligible for streamlined processing.

will also make the Commission's handling of transactions involving common carriers consistent with how it currently handles transactions involving international authorizations.<sup>40</sup>

21. We agree with commenters who assert that the Commission should be able to review non-controversial applications within this time period, or remove the application from streamlined treatment when the Commission "deems such an inquiry to be in the public interest."<sup>41</sup> We also find that this 30-day process would reduce any confusion by harmonizing the timeline in the section 214 transfer of control rule with the one in the section 214 discontinuance rule.<sup>42</sup> Finally, we agree with commenters that this rule would serve the public interest by providing applicants with a date certain for domestic transfers of control, after which every transaction may close, unless the Commission otherwise notifies the applicant.<sup>43</sup> In so concluding, we disagree with CenturyTel that "after the fact" notice for corporate transfers of control would serve the public interest.<sup>44</sup> The Commission must fulfill its statutorily imposed

<sup>40</sup> We note that the International Bureau similarly handles streamlined procedures under delegated authority. See, e.g., 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations, Report and Order, 14 FCC Rcd 4909, 4913 (1999) (*International Streamlining Order*) ("If, during [the] 14-day waiting period, the Commission staff determines that an application should not be granted through the streamlined process, it will notify the applicant in writing that the application has been removed from streamlined processing. Otherwise, an application will be deemed granted 14 days after the initial public notice, and the applicant may begin operating on the 15<sup>th</sup> day."). Although the Commission concluded that certain categories of international section 214 applications generally should be subject to streamlining, it delegated to the International Bureau the authority to identify those particular applications that do warrant public comment and additional Commission scrutiny. The Commission reasoned that because the process gave staff an opportunity to identify any extraordinary applications that might warrant public comment, it was able to include a broader class of applications within the streamlining procedure than if it had relied upon applicants alone to determine whether they qualified for streamlining. See *id.* at 4920.

<sup>41</sup> Qwest Comments at 6. We further note that the Commission's streamlined procedures for handling the carrier-to-carrier sale or transfer of a subscriber base typically permit the acquisition of subscribers to occur at the end of a 30-day notice period. See 47 C.F.R. § 64.1120(e).

<sup>42</sup> See 47 C.F.R. § 63.71(c). While commenters propose approval periods that range from 14 days to 60 days, most, including AT&T, WorldCom, and Verizon view a 30-day public notice period as appropriate for at least some portion of the streamlined applications, if not all. For example, AT&T asserts that section 214 authorizations for non-dominant carriers should be automatically granted within 30 days. AT&T Comments at 2-3. WorldCom proposes a 30-day review period for non-dominant carriers, and a 60-day review period for dominant carriers. WorldCom Comments at 4. (We note, however, that ASCENT challenges WorldCom's claim that the Commission could sufficiently address public interest concerns merely by reviewing materials filed pursuant to advance notice rules. See ASCENT Reply Comments at 10.) Verizon proposes a prior notice procedure under which the public would be afforded 30 days to comment on an application for change in corporate control. Verizon Comments at 6-7. If there are no comments or the Commission does not consider any objections to be a valid basis to delay the transaction, the transaction could close after 60 days without affirmative Commission action. *Id.* Qwest proposes that domestic section 214 applications be granted automatically after 31 days for both dominant carriers and non-dominant carriers that are not otherwise covered by a blanket authorization. Qwest Comments at 2.

<sup>43</sup> Qwest Comments at 6.

<sup>44</sup> CenturyTel proposes an "after the fact" notice procedure wherein applicants would file only "pro forma notices" giving the Commission notice of the transaction within 30 days *after* closing the transaction. CenturyTel Reply Comments at 5. CenturyTel states that "[t]he transaction would then be deemed approved unless the Commission (continued....)

duty to determine whether the transaction serves the public interest, notwithstanding the legitimate desire of applicants to obtain the most expedited review possible. Therefore, we conclude that applicants shall continue current practice and provide the Commission prior notice of proposed transfers of control to permit a short period for comment and review, even in the context of streamlined processing of domestic section 214 applications.

22. As provided herein, approval shall be effective and transactions may close on Day 31 following public notice of acceptance of an application for filing, unless the Commission indicates otherwise by Day 30. In addition, the Commission will issue a short public notice or order at the close of the streamlined review period to announce that the proposed transfer of lines would serve the public interest, and to explain as appropriate why any adverse comments filed in opposition to the application failed to persuade us to the contrary. Although approval is effective on Day 31 absent Commission action to the contrary, for purposes of the computation of time for filing a petition for reconsideration or application for review, or for judicial review of the Commission's decision, the date of "public notice" shall be the date of the release of such explanatory public notice or order.<sup>45</sup>

23. When applicants submit applications for transfers of multiple licenses or authorizations that relate to the same proposed transaction, and a joint public notice and pleading cycle facilitates our coordination and efficient resolution, we authorize the applicable bureaus to issue joint public notices even if the domestic section 214 application is eligible for streamlined review. We note that applications filed under Title III for transfers of control require a comment period of not less than 30 days (*i.e.*, a minimum 30-day review period during which comments may be filed up until the last day).<sup>46</sup> As a result, in order to afford due consideration to comments received during this 30-day period, the Commission can rarely issue an approval of such an application by Day 31. Therefore, we recognize that in joint notice situations involving requests for transfer of control of wireless licenses under Title III and applications for domestic section 214 transfers of control, such as those involving incumbent LECs,<sup>47</sup> it may be necessary to remove the domestic section 214 application from the streamlined procedures, and substitute an alternative comment and approval period. There would be no such need in joint notices

(Continued from previous page)

were to take contrary action." *Id.* This model would apply only to small and mid-sized carriers because, according to CenturyTel, the limited size and nature of such transactions do not trigger public interest concerns. "Mid-sized incumbent local exchange carriers" are those carriers whose operating revenue equals or exceeds the "indexed revenue threshold" and whose revenue when aggregated with the revenues of any local exchange carrier that it controls, is controlled by, or with which it is under common control, is less than \$7 billion. CenturyTel Reply Comments at 5 n 8. CenturyTel Comments at 3-5; WorldCom Comments at 7.

<sup>45</sup> See 47 C.F.R. § 1.4.

<sup>46</sup> See 47 U.S.C. § 309(d)(1).

<sup>47</sup> Incumbent LECs often file transfer of control applications in the Common Carrier Bureau, the International Bureau, and the Wireless Telecommunications Bureau that relate to the same transaction. The wireless licenses, such as those pertaining to PCS or cellular services, are Title III licenses subject to a 30-day petition period under sections 309(b) and 309(d)(1) of the Act.

relating only to section 214 applications.<sup>48</sup> In cases in which the bureaus determine that joint processing of related transfer applications is not desirable or appropriate, the Common Carrier Bureau will have the authority to grant a transfer of control application under streamlined review conditioned on completion of related reviews by any other bureaus. Therefore, for example, a streamlined grant by the Common Carrier Bureau would in no way prejudice the outcome of a pending wireless transfer application.<sup>49</sup>

## **B. Eligibility for Streamlined Treatment**

### **1. Background**

24. In the Notice, we sought comment on whether there are certain types of transactions that should always qualify for streamlined treatment.<sup>50</sup> The Commission stated that its goal was to draft rules that are simple and clear, that would aid predictability, and that would reduce controversy over whether a proposed transfer of control was eligible for streamlined processing.<sup>51</sup> Moreover, the Notice stated that the Commission was seeking proposals to reduce the legal and business burdens associated with domestic section 214 applications. Accordingly, the Notice sought comment on criteria to determine eligibility for streamlining. For example, the Notice sought comment on whether the size of the parties – in terms of access lines, revenues or some other measure – should be a qualifying factor.

25. Because procedures governing other Commission licensing and authorization processes may be relevant to domestic section 214 streamlining, the Notice briefly described some of those procedures, including the domestic section 214 discontinuance process for common carriers, the rules that apply to applications to provide international common carrier service under section 214, and the rules applicable to transfers of control of licenses involving commercial mobile radio services (CMRS) under section 310 of the Act.<sup>52</sup> Relying on these

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<sup>48</sup> A number of transactions involving competitive LECs and small interexchange carriers require filings only with the Common Carrier Bureau and the International Bureau because the carriers require section 214 authorization but do not hold any wireless licenses. As noted, the default 14-day comment period in the Streamlining Rule for domestic service applications is in harmony with the International Bureau's streamlined review period.

<sup>49</sup> The International Bureau commonly conditions its streamlined grants on the parties' obtaining all necessary approvals from the Commission that relate to the same transaction. *See, e.g., International Authorizations Granted*, Report No. TEL-00377, DA 01-849 (rel. Apr. 5, 2001) (granting on a streamlined basis under section 63.12 of the Commission's rules transfer of Chorus's international section 214 authorizations to Telephone and Data Systems, Inc., with consummation of the proposed transaction conditioned on grant of the domestic section 214 and wireless transfer applications). Similarly, the blanket authority in section 63.01 for any domestic carrier to start up new operations is conditioned upon the carrier "obtain[ing] all necessary authorizations from the Commission for use of radio frequencies." 47 C.F.R. § 63.01.

<sup>50</sup> Notice at para. 20.

<sup>51</sup> *Id.* at para. 21.

<sup>52</sup> *Id.* at paras. 14-19.

models as a starting point, a number of commenters argue that the Commission should grant presumptive streamlined treatment to non-dominant carriers only.<sup>53</sup> Other commenters propose variations of this streamlining model for non-dominant carriers, or variations of models discussed in the Notice.<sup>54</sup>

26. The Notice also asked whether “combinations involving certain product or geographic markets” should automatically trigger streamlined eligibility or disqualification; whether a “failing firm” rationale should be developed for transactions involving bankrupt or financially-troubled carriers;<sup>55</sup> whether market share, a proxy for market power, should be considered; and how market share and market concentration should be calculated. In response, some commenters argue that relative market power and business size could be used effectively to determine streamlining eligibility.<sup>56</sup>

## 2. Discussion

27. We conclude that it is appropriate to presumptively streamline certain categories of domestic carrier transactions. In addition, for the reasons more fully explained below, we conclude that all domestic section 214 transfer of control applicants, including dominant carriers, will have an opportunity to show that their applications should receive streamlined treatment.

28. We further conclude that the Commission, acting through the Common Carrier Bureau, will decide on a case-by-case basis whether streamlined treatment should be afforded to a particular application.<sup>57</sup> We note that the Commission’s delegation of authority to the Common

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<sup>53</sup> AT&T Comments at 13; ASCENT Reply Comments at 6; CenturyTel Reply Comments at 6; CompTel Comments at 2 (suggesting the Commission should forbear from reviewing transfers of control under section 214 whenever a non-dominant carrier is involved). Moreover, according to Qwest’s proposed process, “resellers and non-dominant carriers with blanket 214 authority would not file additional section 214 applications for change of corporate control . . . [i]nstead the parties to these transactions would file a post-transaction notice within a reasonable period after the transaction.” Qwest Comments at 2.

<sup>54</sup> See, e.g., WorldCom Comments at 4-5 (proposing a 30 day streamlined review for non-dominant carriers and a 60-day review for dominant carriers); Verizon Comments at 5-7 (proposing streamlined review for “non-controversial” applications where, for example, an applicant is dominant but earns revenues below the threshold designated in Part 32 of the Commission’s rules for “Class A” companies). See also ASCENT Comments at 2, 4, 8-9; ASCENT Reply Comments at 7-8, 10-13 (opposing the Verizon, WorldCom and CompTel proposals).

<sup>55</sup> Our proposal in the Notice to consider “something akin to a failing firm” exception derived from the “failing firm” affirmative defense described in the U.S. Department of Justice and Federal Trade Commission Merger Guidelines (“DOJ/FTC Merger Guidelines”). The “failing firm” defense states that if imminent business failure would cause the assets of one of the merging firms to exit the market, and other specifically defined circumstances are met, then the merger is not likely to create or enhance market power or facilitate the exercise of market power. Therefore, a merger with a “failing firm” would result in market performance no worse than had the merger been blocked by the government. Notice at para. 20; see also DOJ/FTC Merger Guidelines, Section 5.0-5.1.

<sup>56</sup> WorldCom Comments at 6-7; ASCENT Reply Comments at 14.

<sup>57</sup> In the Filing Rule, we require carriers seeking streamlined treatment to explain why they should receive such treatment.

Carrier Bureau in this decision does not expand or grant any new or additional delegated authority to the Bureau beyond the scope of delegated authority contained in the Commission's existing rules. Furthermore, we note that the Common Carrier Bureau does not have the authority to act on any applications or requests which present novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.<sup>58</sup> We find, however, that certain types of transactions that by their nature are extremely unlikely to raise the potential of public interest harm should presumptively be afforded streamlined treatment. Although all carriers are "eligible" to seek streamlining, we conclude that it is appropriate to presumptively streamline certain categories of applications.<sup>59</sup> Our primary purpose in creating these presumptive categories is to provide potential applicants with greater regulatory certainty about the manner in which the Commission will process their applications, consistent with the public interest.<sup>60</sup> Therefore, except as qualified by the next sentence, the streamlined procedures provided in this Order shall be presumed to apply to all transfer of control applications in the following categories: (1) both applicants<sup>61</sup> are non-facilities-based carriers;<sup>62</sup> (2) the transferee is not a telecommunications provider; (3) the proposed transaction involves only the transfer of local exchange assets of an incumbent LEC by means other than an acquisition of corporate control; (4) neither of the applicants is dominant with respect to any service; (5) the applicants are a dominant carrier and a non-dominant carrier that provides services exclusively outside the geographic area where the dominant carrier is dominant; or (6) the applicants are incumbent independent LECs<sup>63</sup> that have, in combination, fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide and no overlapping or adjacent service areas. With respect to categories 4 through 6 above, an application would be presumptively streamlined only

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<sup>58</sup> See 47 C.F.R. § 0.291(a)(2).

<sup>59</sup> Moreover, applications that do not qualify for presumptive streamlined treatment may still be afforded streamlined treatment on a case-by-case basis, and applications that qualify for presumptive streamlined treatment may be removed from streamlined processing if the Commission, through comments or otherwise, becomes aware of facts or issues warranting removal. As a result of our ability to fine-tune the presumptive streamlining on a case-by-case basis, we believe it is reasonable to proceed with presumptively streamlined categories that take account of such factors as dominance, non-dominance, and other readily ascertainable, relevant considerations. In contrast, as noted, we have rejected use of those factors as an absolute threshold for eligibility because such a rigid threshold would have prevented us from making individualized determinations. As a result, such rigid eligibility thresholds may have prevented applications that merit streamlining from receiving appropriate streamlined treatment.

<sup>60</sup> See WorldCom Comments at 2.

<sup>61</sup> As used in this discussion, the terms "applicant," "carrier," "party," and "transferee" (and their plural forms) include any affiliates of such entities within the meaning of section 3(1) of the Communications Act of 1934, as amended.

<sup>62</sup> In the Notice, the Commission clarified that current section 63.01 does not exempt resellers and non-dominant carriers from filing section 214 applications. Notice at para. 8. *But see* Qwest Comments at 3-4 (disagreeing with the Commission's interpretation of section 63.01).

<sup>63</sup> As used in this Order, the term "incumbent independent LEC" shall have the same meaning as that term is given under section 64.1902 of our rules, 47 C.F.R. § 64.1902.

where a transaction would result in a transferee having a market share in the interstate, interexchange market of less than 10 percent, and the transferee would provide competitive telephone exchange services or exchange access services (if at all) exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction.

29. In considering which types of applications should be presumptively streamlined, we find that a transaction is unlikely to raise public interest concerns where the transferee is not a telecommunications carrier because in such situations there is not likely to be an increase in concentration in a particular market. Accordingly, we establish a presumptively streamlined category in our Streamlining Rule for those transactions. We also find that it is extremely unlikely that applicants that operate solely on a resale basis would have an incentive to act in an anticompetitive manner, given that their operations depend on the facilities of another carrier. Accordingly, we presumptively streamline applications in which both applicants are non-facilities-based carriers.

30. In contrast, where facilities-based carriers are proposing to combine, the potential that a transaction could produce public interest harm is greater. Where facilities-based carriers proposing to combine are not dominant with respect to any service, however, it is extremely unlikely that the proposed combination could result in a public interest harm, particularly where their combined market shares are relatively low. Accordingly, we conclude that we should presumptively streamline transfer applications involving domestic, interstate carriers that are not dominant in the provision of any service where their combined post-transaction market presence is unlikely to raise public interest concerns.<sup>64</sup> Specifically, if a transaction proposes to combine the interexchange services of two non-dominant carriers, the application will be presumptively streamlined if the transferee's market share in the interstate, interexchange market following the transaction would be less than 10 percent.<sup>65</sup> Similarly, if a transaction proposes to combine the telephone exchange services and/or exchange access services of two non-dominant carriers, the application will be presumptively streamlined if their services are offered exclusively in geographic areas served by a dominant local exchange carrier.

31. In addition, a dominant carrier may be non-dominant where it provides services out-of-region.<sup>66</sup> Therefore, with respect to transfers of control involving dominant carriers, we

<sup>64</sup> AT&T Comments at 13; ASCENT Comments at 1-9; CompTel Comments at 4; Verizon Comments at 7-8; WorldCom Comments at 6-10; Qwest Reply Comments at 3.

<sup>65</sup> Our presumption in favor of streamlining for transactions that result in less than 10 percent market share is based upon guidelines suggesting that total combined market shares of less than 10 percent in markets that are "moderately concentrated" – or even "highly concentrated" – are "unlikely to have adverse competitive consequences and ordinarily require no further analysis." In our view, such combinations should merit a careful, although streamlined review. See U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, Section 1.51, n.18 (DOJ/FTC Merger Guidelines); *But see* Qwest Comments at 2 (stating that Qwest opposes the "import [of] additional notions from the DOJ/FTC premerger notification process" into Commission review of section 214 applications).

<sup>66</sup> See Qwest Reply Comments at 2, 4; Verizon Reply Comments at 2-3.

are less concerned about the likelihood of public interest harms occurring as a result of a merger with a carrier that operates outside of a dominant carrier's region than we are about the likelihood that public interest harms might occur as a result of a merger with a carrier that operates within the dominant carrier's region.<sup>67</sup> Accordingly, when a dominant carrier seeks to combine operations with a non-dominant carrier that operates exclusively outside the geographic area where the dominant carrier is dominant, we will apply the two simple tests discussed in the above paragraph to determine whether the application should be entitled to presumptively streamlined treatment.<sup>68</sup>

32. Based on the Commission's section 214 precedent, we find that combinations involving incumbent independent LECs with fewer than two percent of the nation's subscriber lines raise less significant public interest concerns than those in which one of the parties is a larger incumbent independent LEC.<sup>69</sup> For example, we have concluded in past orders that such transactions are unlikely to raise public interest concerns if the applicants do not actually compete in each other's local exchange area and do not have incumbent local exchange areas that are adjacent to each other.<sup>70</sup> Accordingly, we conclude that when the parties to a domestic section 214 transfer application are incumbent independent LECs that have, in combination, fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide,<sup>71</sup> and no overlapping or adjacent service areas, we will presumptively streamline the transfer application, provided that it meets the criteria set forth above for presumptive streamlined treatment of facilities-based non-dominant carriers.

33. Finally, we presumptively streamline domestic section 214 transfer of control applications proposing transactions that involve the transfer of an incumbent LEC's local exchange assets by means other than an acquisition of corporate control.<sup>72</sup> Previously, these types of transactions were governed by our discontinuance rules rather than our transfer of control rules. As explained more fully in Section VI *infra*, we find that harmonizing the regulatory treatment of asset acquisitions with transfers of corporate control is supported by the text of section 214 of the Act and sound public policy. We note, however, that many asset sales

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<sup>67</sup> See WorldCom Comments at 6 (proposing that any streamlining plan must take into account whether, in an assignment or transfer case, the assignment or transfer will result in additional concentration in the geographic and product markets where an incumbent LEC serves).

<sup>68</sup> See *id.* at 6-9.

<sup>69</sup> In the Matter of ALLTEL Corp., *Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control*, 14 FCC Rcd 14191, 14195 (1999) (finding that the merger of ALLTEL and Aliant would not create a giant communications services provider of sufficient size to dominate the industry or affect significantly the Commission's implementation of the Communications Act and federal communications policy).

<sup>70</sup> See *id.*, 14 FCC Rcd at 14194.

<sup>71</sup> See 47 U.S.C. § 251(f)(2).

<sup>72</sup> See CenturyTel Comments at 3-4, 6.

that we have approved under our discontinuance framework did not raise public interest issues, and often involved the sale of rural exchanges from larger incumbent LECs to smaller incumbent LECs that specialize in providing service in rural areas.<sup>73</sup> In light of our history with this type of transaction, we find that transfers of incumbent LEC local exchange assets are unlikely to raise the potential of competitive harm, and therefore are eligible for presumptive streamlined treatment.<sup>74</sup>

34. In determining whether an application is entitled to presumptive streamlined treatment, we note that, if an application fails to qualify for the presumption, it may still be entitled to streamlined treatment under the case-by-case approach.<sup>75</sup> As explained above, the purpose of specifying presumptive categories is not to limit the types of applications that may obtain streamlined processing, but merely to provide greater assurance to potential applicants about the likely manner in which their applications will be processed by the Commission.<sup>76</sup> In short, we find that a general rule in which all applications are eligible for streamlined processing, and certain categories of applications are presumed up front to be entitled to streamlined processing, is the one that best reduces regulatory burdens on domestic telecommunications carriers, while at the same time ensuring that we continue to serve the public interest under section 214 of the Communications Act.

35. Some commenters argue that dominant carriers should not be eligible for streamlined processing under any circumstances.<sup>77</sup> We disagree. Excluding dominant carriers as a class from the benefits of streamlined treatment would be unnecessarily overbroad.<sup>78</sup> For example, the Commission has found that BOCs are non-dominant in their provision of domestic out-of-region interstate interexchange services, and has further found that a BOC's section 272 interLATA affiliate is non-dominant in the provision of domestic in-region interstate interLATA

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<sup>73</sup> We note that asset sales of competitive carriers are covered under other parts of the Streamlining Rule pertaining to non-dominant carriers. See para. 30, *supra*.

<sup>74</sup> As with all other streamlined applications, the Commission will remove an application involving the sale of incumbent LEC exchanges from streamlined processing if the proposed transaction raises public interest concerns that require more detailed analysis. For example, if one Bell operating company (BOC) sought to purchase substantially all the local exchange assets of another BOC, such a transaction would likely be removed from streamlined processing.

<sup>75</sup> We note that the Common Carrier Bureau does not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines. See 47 C.F.R. § 0.291(a)(2).

<sup>76</sup> See WorldCom Comments at 2 ("First and foremost, the Commission should ensure that its new rules enhance the predictability of the domestic Section 214 process.").

<sup>77</sup> See, e.g., ASCENT Comments at 12; ASCENT Reply Comments at 1-4, 6-14; AT&T Comments at 3; WorldCom Comments at 6.

<sup>78</sup> Verizon Comments at 5 (proposing streamlined treatment for dominant carriers falling below a \$100 million revenue threshold); Verizon Reply Comments at 2-3; Qwest Reply Comments at 4-5.

services.<sup>79</sup> The relevance to our public interest analysis of a transfer application, of a carrier's classification as dominant, will depend on a number of factors, including the types and locations of the services provided by the other party to the transaction.<sup>80</sup> Significantly, the Commission retains the ability to reject or remove from streamlined treatment any application filed by a dominant carrier that implicates our public interest concerns.<sup>81</sup> Accordingly, we find no reason to create an eligibility rule that excludes dominant carriers entirely from the benefits of streamlined processing of their applications.<sup>82</sup>

36. Other commenters suggest that we eliminate the authorization process entirely for non-dominant carriers.<sup>83</sup> We decline to do so. As AT&T points out, applications involving non-dominant carriers could propose transactions that would result in a transferee having sufficient post-transaction market presence to warrant non-streamlined review.<sup>84</sup> Moreover, a rule based solely on a dominant/non-dominant distinction would create significant regulatory uncertainty, especially where new types of telecommunications services are being defined and deployed at the high pace seen in recent years. We find a rule that minimizes reliance upon unnecessary distinctions among carriers to be better suited to the current telecommunications environment.

37. For similar reasons, we also decline to adopt commenters' specific proposals that size of the parties, geographic market definition, and market power, however measured, should be dispositive factors in determining eligibility of a carrier for streamlined review.<sup>85</sup> However, as we have already explained, such factors may be relevant to qualifications for presumptive streamlining. As Qwest points out, elaborate and time-consuming threshold calculations, such as those pertaining to revenue or market share, could well result in "squabbles over eligibility [that] would swallow the exception or duplicate the ultimate review."<sup>86</sup> We find that applicants would use these measurements as advocacy tools rather than as factual thresholds, and the resources and time required to confirm or rebut the accuracy of such data would defeat our goal of providing

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<sup>79</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15802, 15866 (1997). See also Qwest Reply Comments at 4-6; Qwest Comments at 1, 2 and 4; Verizon Reply Comments at 3.

<sup>80</sup> WorldCom Comments at 6-9; Verizon Reply Comments at 3.

<sup>81</sup> ASCENT Comments at 2, 4-5; AT&T Comments at 2; Verizon Reply Comments at 4.

<sup>82</sup> Qwest Comments at 1-2; Qwest Reply Comments at 4; cf. AT&T Comments at 12-13.

<sup>83</sup> See, e.g., CompTel Comments at 1-2, 4-5; Qwest Comments at 3-4; see also AT&T Comments at 2; ASCENT Reply Comments at 13.

<sup>84</sup> See AT&T Comments at 13; ASCENT Reply Comments at 7-8; cf. Verizon Comments at 5.

<sup>85</sup> Qwest Reply Comments at 3; cf. AT&T Comments at 8-12.

<sup>86</sup> Qwest Reply Comments at 3; Qwest Comments at 6-7.

relatively simple and clear guidelines for streamlining.<sup>87</sup>

38. We disagree with ASCENT, which opposes extension of eligibility for streamlined treatment to domestic section 214 applications involving dominant carriers and certain non-dominant carriers.<sup>88</sup> As noted above, the relevance to our public interest analysis of a carrier's classification as dominant will depend on a number of factors, including the types and locations of the services provided by the other party to the transaction.<sup>89</sup> Therefore, we decline to automatically exclude from streamlined treatment all applications involving dominant carriers. We also decline to adopt ASCENT's proposed threshold measures to determine when streamlined treatment may be accorded to non-dominant carriers. ASCENT proposes that the majority of non-dominant carriers applications that are not subject to section 63.18 of the Commission's rules governing international transfer of control applications could be accorded streamlined treatment when two thresholds are met.<sup>90</sup> First, the non-dominant carrier must have net sales or total assets no greater than \$500 million.<sup>91</sup> Second, ASCENT would require that those carriers not possess more than "10,000 high-speed service lines in any LATA (or 25,000 in any state) or 250,000 voice grade equivalent lines or wireless channels in any LATA (or 750,000 in any state)."<sup>92</sup> According to ASCENT, only those transfers of control that satisfy these two thresholds could ever qualify for streamlined treatment.<sup>93</sup>

39. We conclude that ASCENT's proposal would be overly restrictive and could exclude from streamlining a significant number of transactions that are likely to merit streamlined treatment. While calculating the net telecommunications sales, total telecommunications assets, and the number of high speed, voice grade or wireless lines could be

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<sup>87</sup> See Notice at para. 21. In contrast, we note that transfers of control involving small, facilities-based interexchange carriers, where the transferee's post-transaction market share would total no more than 10 percent, are not likely to raise market concentration or other public interest issues and should be presumptively streamlined. See *supra* para. 30. Interexchange market shares are fairly easy to determine, so they are unlikely either to pose a great filing burden on applicants or to generate extensive dispute about an applicant's claims. See, e.g., Federal Communications Commission, Statistics of Communications Common Carriers (2001). The existence of a dominant carrier in the geographic areas where a carrier provides local exchange and exchange access services is also both easy for applicants to determine and easy for the Commission to verify because the Commission issues orders declaring such classifications. See, e.g., *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15767 (1997).

<sup>88</sup> ASCENT Comments at 9-14; ASCENT Reply Comments at 6.

<sup>89</sup> See ASCENT Reply Comments at 5.

<sup>90</sup> See also CompTel Comments at 2-5.

<sup>91</sup> ASCENT Comments at 9-13; ASCENT Reply Comments at 13.

<sup>92</sup> ASCENT Comments at 12; Qwest Reply Comments at 3-4; see also AT&T Comments at 8-12.

<sup>93</sup> ASCENT Comments at 12.

a useful way to identify the size of a contemplated transaction,<sup>94</sup> the standard for whether streamlined treatment is warranted should not be mere size, but instead whether or not the transaction is likely to raise a significant potential for public interest harm, such as to require more detailed scrutiny. We reject ASCENT's underlying assumption that size or dominance alone should be the sole determinative factors for eligibility for streamlining.<sup>95</sup> Accordingly, we do not adopt ASCENT's threshold standards because, as formulated, they are not sufficiently probative of the public interest impact of a transaction.

40. As we stated in the Notice, the Regulatory Flexibility Act requires the Commission to consider the possible economic impact that streamlining may have on small entities. We believe our decision to permit eligibility of both dominant and non-dominant carriers to receive streamlined treatment of transfers of control will have a positive impact on small carriers while preserving the Commission's duty to examine transactions to determine if they serve the public interest. Under the streamlining rule we adopt today, all carriers are eligible for streamlined treatment, including small dominant LECs.<sup>96</sup>

### **C. Removal of Applications from Streamlining**

#### **1. Background**

41. The Notice tentatively concluded that the Commission should reserve its authority to remove applications from streamlined review, as it does in the case of transfers of international authorizations and wireless licenses.<sup>97</sup> We also asked parties to address the circumstances under which the streamlined process should be halted and a written decision issued.<sup>98</sup> In general, commenters recognize that the Commission must retain authority to remove an application from streamlined review because "there may be instances in which an individual application . . . presents unique questions as to the impact of the proposal on interstate service."<sup>99</sup> No commenter suggests that streamlining should immunize a carrier's application from a detailed review if the Commission discovers issues that may impact the public interest.<sup>100</sup>

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<sup>94</sup> ASCENT indicates that carriers provide these figures in FCC Form 477, the Local Competition and Broadband Reporting Worksheet. *Id.* at 11.

<sup>95</sup> AT&T Comments at 8-12; ASCENT Reply Comments at 14.

<sup>96</sup> CompTel Comments at 1; ASCENT Reply Comments at 10, 14-15.

<sup>97</sup> Notice at para. 32.

<sup>98</sup> *Id.* at para. 32.

<sup>99</sup> Verizon Reply Comments at 3-4; ASCENT Comments at 5; AT&T Comments at 13.

<sup>100</sup> Verizon states that if a transaction requires a protracted review, the Commission must nevertheless act within a stated period of time to foster predictability. Verizon Comments at 3.

42. Although commenters generally recognize that the Commission must retain authority to remove an application from streamlining, a few commenters contend that Commission review of domestic transfers of control under section 214 is redundant with the international section 214 authorization process, with reviews conducted under Title III, and with reviews conducted by the antitrust agencies. One group of commenters argues that the Commission should limit its review of section 214 applications merely to a public convenience and necessity standard, and others argue that the Commission should retain its authority to engage in broader public interest analysis.<sup>101</sup>

## 2. Discussion

43. We conclude that it would serve the public interest to affirm our tentative conclusion, supported by WorldCom, that the Commission, acting through the Common Carrier Bureau, should review applications submitted under the streamlined processing rules to determine whether a particular application should qualify for streamlined processing.<sup>102</sup> This rule would serve the public interest by making the domestic section 214 procedure consistent with our streamlined rules in other contexts where the Commission acts through the International Bureau and the Wireless Telecommunications Bureau in reviewing and approving both streamlined and non-streamlined applications. The expedited process we adopt here – consisting of a 14-day comment period and a 7-day reply period, with freedom to close a transaction on the 31<sup>st</sup> day – requires swift and standardized action. Accordingly, if a streamlined application does not raise public interest concerns, detailed scrutiny by the full Commission should not be necessary.

44. We conclude, however, that streamlining should not immunize applications from detailed review if the Bureau is faced with an application that raises public interest issues or such concerns are raised during the review process. We agree with ASCENT that the section 214 application process is sometimes the only vehicle the Commission has for undertaking such an analysis.<sup>103</sup> Moreover, we also agree with WorldCom's contention that the Commission should ensure that important public interest concerns, such as the control of exercise of market power and the promotion of competition in the local exchange markets, are adequately protected by any new streamlined rules.<sup>104</sup> Therefore, the Commission may remove such applications from streamlined processing when it finds, or when comments raise, significant public interest concerns requiring further Commission inquiry and resolution.

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<sup>101</sup> ASCENT Reply Comments at 3, 9; Qwest Comments at 9; WorldCom Comments at 2.

<sup>102</sup> See WorldCom Comments at 5. We note that the Common Carrier Bureau does not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines. See 47 C.F.R. § 0.291(a)(2).

<sup>103</sup> ASCENT Reply Comments at 3.

<sup>104</sup> WorldCom Comments at 2.

45. When an application is removed from streamlined treatment, or does not initially qualify for streamlined treatment, the Commission will issue a public notice indicating why streamlined processing is not appropriate for the particular application in question and provide an estimate as to the length of the expected review period. As the Streamlining Rule states, only in extraordinary circumstances should the review period be longer than 180 days from public notice that an application has been accepted for filing.<sup>105</sup> In addition to these steps, the rule we adopt today gives examples of appropriate reasons for the Commission to remove an application from streamlining or to initially refuse to grant streamlined treatment. Examples of appropriate circumstances for such action are where: (1) an application is associated with a non-routine request for waiver of the Commission's rules; (2) an application would, on its face, violate a Commission rule or the Communications Act; (3) an applicant fails to respond promptly to Commission inquiries; (4) timely-filed comments on the application raise public interest concerns that require further Commission review; or (5) the Commission, acting through the Common Carrier Bureau, otherwise determines that the application requires further analysis to determine whether a proposed transfer of control would serve the public interest.<sup>106</sup> These rules are intended to reduce uncertainty associated with the regulatory process that has concerned past applicants, including commenters to this proceeding.<sup>107</sup>

46. We disagree with commenters that maintain that the Commission should invoke its section 214 authority to review domestic applications only when there is no international 214 application pending.<sup>108</sup> Moreover, in addition to adopting the international rules for notice and review, ASCENT proposes that the Commission adopt a policy where domestic acquisitions of corporate control will be deemed automatically granted upon the grant of an application filed under the international rule, obviating the need to adhere to the Notice's proposed 31-day review period.<sup>109</sup> We decline to adopt this approach because these proposals would go beyond streamlining the domestic process to granting blanket authority to all domestic transfer of control applications, even where such transfers would raise domestic policy concerns.<sup>110</sup> We do not believe that adoption of such an approach would be consistent with the Commission's duty to make a public interest determination with respect to domestic facilities and services because the

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<sup>105</sup> See *Proposed Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Requests for Authorizations Relating to Complex Mergers*, FCC Transaction Team Public Forum (rel. Mar. 1, 2000), available at <[www.fcc.gov/transaction/timeline.doc](http://www.fcc.gov/transaction/timeline.doc)>; see also Verizon Comments at 3.

<sup>106</sup> We note that the Common Carrier Bureau does not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines. See 47 C.F.R. § 0.291(a)(2).

<sup>107</sup> CenturyTel Comments at 6; Verizon Reply Comments at 3-4.

<sup>108</sup> See, e.g., ASCENT Comments at 2; CompTel Comments at 5; see also 47 C.F.R. § 63.12.

<sup>109</sup> 47 C.F.R. § 63.18; ASCENT Comments at 8-9.

<sup>110</sup> See U.S. Chamber of Commerce Comments at 2 (proposing that the Commission grant blanket authority for acquisitions of corporate control).

International Bureau's review of an international section 214 application does not extend to such issues.<sup>111</sup>

47. Likewise, we disagree with CompTel and Qwest that Title III or rules of general applicability are adequate to address all issues raised by domestic transfer of control applications.<sup>112</sup> We find that Title III and international transfer of control applications by themselves do not contain the necessary information for the Commission to evaluate the potential impact of a transaction on domestic common carrier markets. We note that if a carrier is transferring control of only domestic wireline facilities, then neither the International Bureau nor the Wireless Telecommunications Bureau would review the proposed transfer at all. Moreover, review of merger-related public interest harms only through rulemaking and enforcement actions would be an inefficient and burdensome method of addressing regulatory issues that are specific to a particular transaction. We also reject Verizon's assertion that "the Commission [could] expedite processing by limiting its [substantive] review to matters over which it, rather than another federal agency, has exclusive substantive responsibility."<sup>113</sup> Verizon's comments are directed more toward the substance of the Commission's public interest review than the procedures governing the filing and processing of applications. We decline in the context of this streamlining proceeding to make generalized conclusions concerning the appropriate scope of the Commission's review in the myriad of potential transactions that may come before us in the future.

#### **D. *Pro Forma* Transactions**

##### **1. Background**

48. The term "*pro forma*" is defined in section 63.24 of the Commission's rules and includes: (1) assignments from an individual or individuals (including partnerships) to a corporation owned or controlled by such individuals or partnerships without any substantial change in their relative interests; (2) assignments from a corporation to its individual

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<sup>111</sup> Notice at para. 21.

<sup>112</sup> For example, CompTel asserts that the public interest associated with transfers of Title III licenses and section 214 international authorizations is broad enough to encompass concerns about acquisitions of non-dominant carriers providing domestic interstate services or with facilities that are subject to blanket section 214 authority. CompTel Comments at 3. Qwest argues that to the extent the Commission has independent concerns about a particular transfer, it should address those concerns through rules of general applicability using its organic rulemaking power, or by specific enforcement actions, but not through the 214 process. Qwest Comments at 3. Additionally, Qwest states that the Commission should curtail public interest review of license transfers and defer to the antitrust agencies of the federal government to assess competitive issues that arise in changes of control accompanied by section 214 applications. Qwest Reply Comments at 6.

<sup>113</sup> Verizon states that "[i]n the past, the Commission's review has largely duplicated the work of other agencies, such as the Department of Justice . . . or the Federal Trade Commission . . . [and that if] the Commission defers to this comprehensive process and does not attempt to duplicate DOJ's efforts, its review can be substantially reduced in scope and time." Verizon Comments at 3.

stockholders without effecting any substantial change in the disposition of their interests; (3) assignments or transfer by which certain stockholders retire and the interest transferred is not a controlling one; (4) corporate reorganizations that involve no substantial change in the beneficial ownership of the corporation; (5) assignments or transfers from a corporation to a wholly owned subsidiary or vice versa, or an assignment from a corporation to a corporation that is owned or controlled by the assignor stockholders without substantial change in their interests; and (6) assignments of less than a controlling interest in a partnership.

49. In the Notice, the Commission sought comment on whether certain transactions merit treatment similar to that currently afforded *pro forma* assignments and transfers of control in the wireless and international context. Under the international rule, where an assignment or transfer of control falls within certain categories, an assignee or carrier need not obtain prior Commission approval, but must notify the Commission no later than 30 days after the assignment is consummated.<sup>114</sup> Additionally, the Notice sought streamlining suggestions for internal corporate restructurings that result in a new or existing subsidiary that assumes from an existing parent or affiliated company the interstate carrier operations under section 214. For example, the Notice asked whether a waiting period should apply or whether a *pro forma*-style, “notice only, and no prior approval” rule should apply. Some commenters propose that the Commission not be required to issue a written notice of approval of such transactions, thus granting blanket authority to internal corporate restructurings.<sup>115</sup> The Notice pointed out that in the international context, *pro forma* treatment allows authorized carriers to provide service through wholly-owned subsidiaries without prior approval,<sup>116</sup> and allows applicants to use the streamlined authorization process to obtain the same authorizations that any affiliates with the identical ownership have already obtained. We tentatively concluded that applicants, in particular those where the transaction involves internal corporate restructurings, should still be subject to all applicable conditions of service on their routes after an internal restructuring. Thus, the Notice stated that if a carrier begins providing service through a differently named subsidiary, it still would be subject to existing slamming and tariffing rules.<sup>117</sup>

## 2. Discussion

50. We conclude that *pro forma* transactions in general have no impact, or a *de minimis* impact, on the public interest, because the same interstate services will be offered to the same customers following the transfer of lines.<sup>118</sup> We agree with commenters that

<sup>114</sup> Notice at para. 27; *see also* 47 C.F.R. § 63.24.

<sup>115</sup> AT&T Comments at 2, 4-6; CenturyTel Reply Comments at 5; Qwest Comments at 3-5; Verizon Comments at 2, 7-8; WorldCom Comments at 12-13.

<sup>116</sup> 47 C.F.R. § 63.21(i).

<sup>117</sup> Notice at para. 28.

<sup>118</sup> Verizon argues that internal corporate restructurings may serve the public interest because the public would benefit by access to a richer array of interstate services following transfer of control. Verizon Comments at 2.

reorganizations from one internal subsidiary to another do not as a general matter affect the manner in which service is being provided to the public or raise competitive concerns.<sup>119</sup> Because these transactions will not affect actual control of the licensee but merely allow licensees to modify their corporate organization or ownership structure in a non-substantial way from the structure the Commission previously authorized, these transactions should be permitted without Commission oversight or unnecessary scrutiny.<sup>120</sup>

51. We also agree with commenters who contend that we should confer blanket section 214 authority for *pro forma* restructurings where the transactions would result in no change in the carrier's ultimate ownership or control.<sup>121</sup> This blanket grant would eliminate the need for the Commission to issue written approval of the transaction. Moreover, by maintaining blanket authority, the Commission retains the ability to take affirmative enforcement action if any specific condition or restriction impacts the telecommunications service in question.<sup>122</sup> We note that the Commission has an open proceeding where it has proposed changes to its international *pro forma* rule to make it more consistent with *pro forma* treatment of wireless carrier transactions by the Wireless Telecommunications Bureau.<sup>123</sup> Therefore, in order to promote consistency in the Commission's licensing and authorization rules, and to refrain from imposing unnecessary burdens on carriers, we conclude that prior approval will not be required for *pro forma* restructurings, as defined by section 63.24 of the Commission's rules (including any modifications thereto).

52. We affirm our tentative conclusion in the Notice that applicants, in particular those undergoing internal corporate restructurings, would still be subject to all applicable conditions of service on their routes after an internal restructuring. In affirming that conclusion in this Order, we clarify that a carrier may not do indirectly what the law prohibits it from doing directly, that is, circumvent any existing rule or obligation by merely conducting an internal *pro forma* reorganization. Accordingly, if a carrier begins providing service through a differently

<sup>119</sup> AT&T Comments at 2, 4-6; Qwest Comments at 3-5; Verizon Comments at 2, 7-8; WorldCom Comments at 12-13.

<sup>120</sup> AT&T Comments at 2, 4-6. See *In the Matter of Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order, FCC 98-18, 13 FCC Rcd 6293, 6301 at paras. 12, 13 (1998) (*Wireless Streamlining Order*), 13 FCC Rcd 6293, paras. 12-13 (1998); *International Streamlining Order*, 14 FCC Rcd 4909, para. 42 (1999).

<sup>121</sup> AT&T Comments at 2, 4-6; Qwest Comments at 3-5; Verizon Comments at 2, 7-8; WorldCom Comments at 12-13.

<sup>122</sup> Verizon Comments at 7-8.

<sup>123</sup> See *In the Matter of 1998 Biennial Regulatory Review—Review of International Common Carrier Regulations*, Notice of Proposed Rulemaking, 15 FCC Rcd 24264 (2000).

named subsidiary and there has been no change in ultimate ownership or control, the carrier need not notify the Commission; however, the carrier still would be subject to existing tariffing rules and rules concerning unauthorized telecommunications carrier changes.<sup>124</sup> In particular, a carrier that acquires the subscriber base of another carrier must still comply with any relevant requirements of the Commission's streamlined procedures for handling carrier-to-carrier sale or transfer of subscriber bases.<sup>125</sup>

53. We decline to adopt a size restriction on such internal corporate restructurings, as CenturyTel proposes. CenturyTel asserts that only non-controversial applications involving small and mid-sized carriers should be permitted such treatment.<sup>126</sup> Because these *pro forma* transactions would result in no change in the carrier's ultimate ownership or control, the size of the carriers should not be at issue.<sup>127</sup> Moreover, CenturyTel does not explain how it would serve the public interest to limit this rule to small and mid-sized carriers while excluding large carriers. Because the Commission retains the ability to take affirmative enforcement action if any specific condition or restriction impacts the telecommunications service in question, both large and small carriers should be permitted to benefit from this streamlining rule.<sup>128</sup>

54. We decline to adopt commenters' suggestions that we require applicants to file post-consummation notices of *pro forma* transactions. Since the Commission currently employs other means to track and contact carriers, we conclude that imposing our own requirement would be duplicative and would only increase rather than reduce reporting burdens.<sup>129</sup> Thus, no post-transaction notification will be required for most transactions. Although section 63.24 does not define as *pro forma* transactions transfers to a trustee under Chapter 7 of the Bankruptcy Code or transfers to a debtor-in-possession under Chapter 11 of the Bankruptcy Code, we clarify here that we will treat those transfers as *pro forma* with respect to domestic section 214 authorizations. Thus, transfers to a trustee or a debtor-in-possession will not require prior approval by the

<sup>124</sup> See 47 C.F.R. §§ 64.1100-1195; see also Notice at para. 28.

<sup>125</sup> See 47 C.F.R. § 64.1120(e).

<sup>126</sup> CenturyTel Reply Comments at 5.

<sup>127</sup> Verizon Comments at 2, 7-8; Qwest Comments at 3-5; WorldCom Comments at 12-13; AT&T Comments at 2, 4-6.

<sup>128</sup> Verizon Comments at 7-8.

<sup>129</sup> Section 64.1195 of the Commission's rules provides that carriers are required to register with the Commission by filing certain portions of FCC Form 499-A when they commence providing telecommunications service. The required information includes the carrier's business name(s) and primary address(es), the names and business addresses of certain of the carrier's officers, the carrier's regulatory contact and designated agent for service of process, all names under which the carrier has conducted business in the past, and the state(s) in which the carrier provides telecommunications service. Carriers must notify the Commission of any changes to this information within one week of the change. See 47 C.F.R. § 64.1195(g); see also "Consumer Information Bureau Reminds Telecommunications Carriers of their Obligations to Register and Designate an Agent for Service of Process," Public Notice, CC Docket No. 94-129, DA 02-222 (Jan. 30, 2002).

Commission. We will, however, make an exception to our general “no notice required” policy and require that a post-transaction notice be filed with the Commission within 30 days of a *pro forma* transfer to a trustee or a debtor-in-possession. This notice will alert the Commission of a carrier’s bankruptcy, which could have a significant impact on customers, especially if the bankruptcy results in a discontinuance of service. If a carrier files a discontinuance request within 30 days of the transfer in bankruptcy, we will treat the discontinuance request as sufficient to fulfill the *pro forma* post-transaction notice requirement.

#### **E. Waiver Requests**

55. In the Notice, the Commission also sought comment on how streamlined processing would affect commenters’ ability to adequately comment on the variety of waiver requests that applicants may submit.<sup>130</sup> The Commission tentatively concluded that it should make a determination on a case-by-case basis whether to accord streamlined treatment to domestic section 214 applications that are accompanied by waiver requests.<sup>131</sup> Commenters claim that the Commission should adopt its tentative conclusion and make a determination on a case-by-case basis.<sup>132</sup>

56. We conclude that, because waiver requests may require additional scrutiny, domestic section 214 applications that are accompanied by waiver requests are ineligible for streamlined treatment until the Common Carrier Bureau determines on a case-by-case basis that the streamlined review process does not jeopardize the appropriate waiver analysis.<sup>133</sup> We therefore adopt our tentative conclusion. Some waiver requests involve substantive issues and may require a separate public comment and policy review by the Commission, while others could be granted under the streamlined procedures discussed above. Accordingly, the Common Carrier Bureau will make a determination how to proceed prior to placement of the section 214 application on public notice. For example, the Common Carrier Bureau may determine that it is not appropriate to place the waiver request and associated section 214 application on separate public notice comment cycles. We note that if the Common Carrier Bureau determines that a section 214 application that is accompanied by a waiver request is ineligible for streamlined

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<sup>130</sup> Notice at para. 31. Pursuant to section 1.3 of the Commission’s rules, the Commission is permitted to waive its rules if good cause is shown. 47 C.F.R. § 1.3.

<sup>131</sup> Notice at para. 31.

<sup>132</sup> See, e.g., Verizon Comments at 8; WorldCom Comments at 13.

<sup>133</sup> We note that the Common Carrier Bureau does not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines. See 47 C.F.R. § 0.291(a)(2).

treatment, the Commission will endeavor to act on the waiver request and the transaction expeditiously.<sup>134</sup>

## VI. ASSET ACQUISITIONS

### A. Background

57. As the Commission explained in the *1999 Streamlining Order*, acquisitions under section 214 can be either acquisitions of assets, such as by purchase or lease of lines, or acquisitions of corporate control, such as acquisitions of equity ownership (*e.g.*, stock or partnership interests), veto power, or a controlling interest in a board of directors. The Commission found that acquisitions of corporate control often raise serious public interest concerns regarding the state of competition following a proposed acquisition or merger. The Commission also noted that such acquisitions are often contested and draw significant public comments that the Commission is bound to consider.<sup>135</sup> The Commission reasoned that the magnitude of corporate acquisitions and their potential effect on competition distinguished them from acquisitions of assets.<sup>136</sup> Therefore, the Commission decided to include asset acquisitions under blanket authority, while concluding that “corporate acquisitions should not be covered by blanket authority.”<sup>137</sup>

58. In the Notice, the Commission sought comment on whether acquisitions of corporate control, structured as asset acquisitions, could have the potential to adversely impact the public interest. The Commission specifically requested comment on whether the Commission’s current regulatory distinction between asset acquisitions, which result in discontinuance applications by the selling carrier, and stock acquisitions, which require transfer of control filings, may provide an incentive for some firms to structure transactions to avoid rigorous Commission review of matters affecting competition.<sup>138</sup> The U.S. Chamber of Commerce commented in the proceeding by urging the Commission to eliminate the distinction and allow both types of transactions to proceed under the blanket authority of section 63.01.<sup>139</sup> CenturyTel also urges the Commission to eliminate the distinction and to streamline the

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<sup>134</sup> See *Proposed Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Requests for Authorizations Relating to Complex Mergers*, FCC Transaction Team Public Forum (rel. Mar. 1, 2000), available at <[www.fcc.gov/transaction/timeline.doc](http://www.fcc.gov/transaction/timeline.doc)>.

<sup>135</sup> *1999 Streamlining Order*, 14 FCC Rcd at 11374-75, para. 18.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Notice at para. 25.

<sup>139</sup> U.S. Chamber of Commerce Comments at 4.

procedure for both types of applications.<sup>140</sup> AT&T, however, urges the Commission to keep its existing distinction between sales of assets and transfers of corporate control.<sup>141</sup>

## B. Discussion

59. We conclude that those sales of assets where no customers will lose service or have their service impaired as a result of the transaction should be treated as transfers of control rather than discontinuances.<sup>142</sup> Accordingly, we modify section 63.01 to reflect the fact that asset purchases will no longer be subject to blanket authority, but rather will henceforth be treated as transfers of control.

60. We agree with the U.S. Chamber of Commerce and CenturyTel, and we modify our existing rules in this manner due to the significant industry confusion concerning when a transaction is properly characterized as an asset acquisition, which requires the filing of a discontinuance application, and when a transaction should be characterized as a stock acquisition, which requires the filing of a transfer of control application. AT&T has pointed out that carriers have previously not attempted to thwart our filing procedures by falsely presenting transactions as asset sales when the transaction is a transfer of control, but this should not prevent us from making our rules more closely aligned with the statute. As a legal and policy matter, we find no reasoned basis to treat asset acquisitions that do not result in impairment or loss of service differently from stock acquisitions.

61. Specifically, we find that section 214 makes a distinction between the treatment of acquisitions and discontinuances. It does not, however, explicitly distinguish between asset acquisitions and stock acquisitions. For example, part of section 214 refers to acquisitions specifically, stating that:

No carrier shall undertake the construction of a new line or of an extension of any line, or shall *acquire or operate* any line or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the

<sup>140</sup> CenturyTel Reply Comments at 2.

<sup>141</sup> AT&T Comments at 4.

<sup>142</sup> Where an asset acquisition will result in a loss of service, our section 214 discontinuance rules will continue to apply. Specifically, under the current discontinuance regulations, carriers are required to provide notification of discontinuance to: customers, the state public utility commission, the Governor of the State, and the Secretary of Defense. 47 C.F.R. § 63.71. An application may be filed with the Commission after the customer notifications are sent. If the discontinuing carrier is a domestic non-dominant carrier, then the application shall be deemed granted on the 31<sup>st</sup> day after filing with the Commission (unless the Commission has notified the applicant that the grant will not be automatically effective). If the discontinuing carrier is a domestic dominant carrier, then the application shall be deemed granted on the 60<sup>th</sup> day after filing with the Commission (unless the Commission has notified the applicant that the grant will not be automatically effective).

present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.<sup>143</sup>

62. Similarly, another part of section 214 addresses discontinuances specifically, stating that:

No carrier shall *discontinue, reduce, or impair service* to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected. . . .<sup>144</sup>

63. We find that, given that section 214 appears to contemplate one procedure for acquisitions and another for discontinuances, it is appropriate for the Commission to provide separate regulatory treatment for the two types of transactions. We do not, however, find anything in the statutory language that requires us to treat asset acquisitions that do not result in a loss of service as discontinuances. Rather, we find the better interpretation, and indeed the one most closely tied to the statute, is that all acquisitions, be they stock or asset, should be treated in the same manner, provided that they do not result in a loss or impairment of service. Accordingly, we find that the most reasonable interpretation of section 214 is that a discontinuance application must be filed when the acquisition will result in a reduction or impairment of service, and a transfer of control application should be filed when the acquisition will not result in any such service disruption.<sup>145</sup> In either situation, a carrier acquiring part or all of another carrier's subscriber base still must comply with any relevant requirements of the Commission's streamlined procedures for handling carrier-to-carrier sale or transfer of subscriber bases.<sup>146</sup>

64. We conclude that our interpretation of section 214 is appropriate as a policy matter as well. Specifically, we find that requiring a carrier to send out notices of discontinuance to each of its customers in instances where there will, in fact, be no service disruption is both misleading and confusing to customers. Moreover, we find that, as a general matter, complying with the streamlined transfer of control requirements that we adopt today will be less burdensome than the current discontinuance requirements. For example, only one transfer of control application need be filed with the Commission as opposed to separate notices sent out to

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<sup>143</sup> 47 U.S.C. § 214(a) (emphasis added).

<sup>144</sup> *Id.* (emphasis added).

<sup>145</sup> Where the International Bureau and the Common Carrier Bureau rules conflict regarding whether a transaction is a transfer of control, rules of both bureaus should be followed and separate applications should be filed with each bureau.

<sup>146</sup> See 47 C.F.R. § 64.1120(e).

each individual customer.<sup>147</sup> In addition, under the rules adopted today, both dominant and non-dominant carriers are subject to the same 31-day streamlined procedure, unlike the discontinuance procedure, which applies different timeframes to these carriers. For these policy reasons, as well as the legal ones described above, we conclude that applicants may file for streamlined treatment of asset acquisitions that do not result in a loss of service in accordance with the filing procedures set forth in this Order.

## VII. RULE SECTIONS TO BE DELETED

65. In our review of the Commission's rules governing domestic transfer of control authorizations under section 214 of the Communications Act of 1934, as amended ("the Act"), it has come to our attention that several rule sections in the Commission's general Part 0 and Part 1 rules are defunct and should be deleted. Specifically, Rule 1.765 [Consolidation or acquisition of telephone companies] refers to applications under section 221(a) of the Communications Act for authority to consolidate or acquire telephone companies. Section 221(a) was repealed by section 601(b)(2) of the Telecommunications Act of 1996.<sup>148</sup> Under section 221(a), before a consolidation could take place, the Commission was required to make a finding that it was not contrary to the public interest for a telecommunications carrier to acquire control, either by acquisition of the physical assets or the securities, of another carrier.<sup>149</sup> Rule 1.765 also refers to Part 66 of the Commission's rules, which was removed by the Commission.<sup>150</sup> Part 66 concerned the applications to be filed upon the consolidation, acquisition, or change of control of telephone companies pursuant to section 221(a).<sup>151</sup> Because the Part 66 rules were promulgated to effectuate the section 221(a) process, these rules were unnecessary and removed by the Commission after passage of the 1996 Act.<sup>152</sup> Thus, Rule 1.765 will be deleted.

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<sup>147</sup> We note that carriers acquiring another carrier's subscriber base are subject to the customer notification provisions in section 64.1120(e) of our rules. *Id.*

<sup>148</sup> 47 U.S.C. § 601(b)(2); Pub. L. No. 104-104; 110 Stat. 56 (1996) (1996 Act). Congress enacted section 221(a) at a time when local telephone service was viewed as a natural monopoly; thus, section 221(a) allowed competing local telephone companies to merge without facing antitrust scrutiny. See Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 104-458, at 200 (1996) (Joint Explanatory Statement). The statute was usually used to confer immunity on mergers between noncompeting Bell operating subsidiaries or mergers between Bells and small independents within their territories. See Joint Explanatory Statement at 200-01; see also 61 Fed. Reg. 36654 (1996). Congress found, however, that section 221(a) could inadvertently undercut several of the provisions of the Act after passage of the 1996 Act. See Joint Explanatory Statement at 200-01; 61 Fed. Reg. 36654 (1996). The Joint Explanatory Statement clarifies that repeal of section 221(a) would not affect the Commission's ability to conduct any review of a merger for Communications Act purposes, but would simply end the Commission's ability to confer antitrust immunity. See Joint Explanatory Statement at 201.

<sup>149</sup> 47 U.S.C. § 221(a) (1994).

<sup>150</sup> See 61 Fed. Reg. 36654 (1996); 47 C.F.R. §§ 66.11-66.15 (1994).

<sup>151</sup> 47 C.F.R. §§ 66.11-66.15 (1994).

<sup>152</sup> See 61 Fed. Reg. 36654 (1996).

66. Likewise, Rule 1.766 [Consolidation of domestic telegraph carriers], last amended in 1987, refers to applications under “section 22” and section 222 of the Communications Act by two or more domestic telegraph carriers for authorization to effect a consolidation, merger or acquisition. There is no “section 22” in the Act, so this appears to be a typographical error. Since passage of the Telecommunications Act of 1996, section 222 of the Act has been entitled “Privacy of Customer Information,” and contains no reference to telegraph carriers.<sup>153</sup> Therefore, Rule 1.766 will be deleted.

67. Subsection (c) of Rule 0.291, delegating authority to the Chief of the Common Carrier Bureau, addresses only applications under repealed section 221(a) of the Act, as does Rule 1.765 described above. Therefore, subsection (c) of Rule 0.291 will be deleted, and subsequent sections will be renumbered.

68. Finally, Rule 1.762 refers to Part 62 of the Commission’s rules, which was repealed by the Commission.<sup>154</sup> The Commission initiated its examination of its Part 62 rules governing interlocking directorates, as part of its 1998 biennial review of regulations.<sup>155</sup> The Commission concluded that Part 62 was no longer necessary in the public interest.<sup>156</sup> The Commission also concluded that it should forbear from applying those provisions in section 212 of the Act that prohibit any person from holding the position of officer or director of more than one carrier subject to the Act without obtaining prior Commission authorization.<sup>157</sup> Therefore, Rule 1.762 will be deleted.

## VIII. PROCEDURAL MATTERS

### A. Final Regulatory Flexibility Analysis

69. As required by the Regulatory Flexibility Act, as amended, (RFA),<sup>158</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice.<sup>159</sup> The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA. Appendix C sets forth a Final Regulatory Flexibility Analysis for the present Report and Order.

<sup>153</sup> Former section 222, relating to competition among record carriers, was repealed by Pub.L. 103-414, 108 Stat. 4297 (1994). See 47 U.S.C.A. § 222 (historical notes).

<sup>154</sup> 64 Fed. Reg. 43937 (1999).

<sup>155</sup> *Id.*; see also 47 U.S.C. § 212.

<sup>156</sup> *Id.*

<sup>157</sup> 64 Fed. Reg. 43937 (1998).

<sup>158</sup> See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>159</sup> *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket No. 01-150, 16 FCC Rcd 14109 (2001) (*Notice*).

**B. Final Paperwork Reduction Act Analysis**

70. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the Act.

**IX. ORDERING CLAUSES**


71. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 2, 4(i)-(j), 201, 214, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-(j), 201, 214, and 303(r), that the *Report and Order* in CC Docket No. 01-150 IS ADOPTED and Parts 0, 1, and 63 of the Commission's rules, 47 C.F.R. Parts 0, 1, and 63, are amended as set forth in Appendix B.

72. IT IS FURTHER ORDERED that the policies, rules, and requirements adopted herein are adopted and SHALL BECOME EFFECTIVE 30 days after publication of the text or summary thereof in the Federal Register.

73. IT IS FURTHER ORDERED that the collection of information contained herein is contingent upon approval by the Office of Management and Budget.

74. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* in CC Docket No. 01-150, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

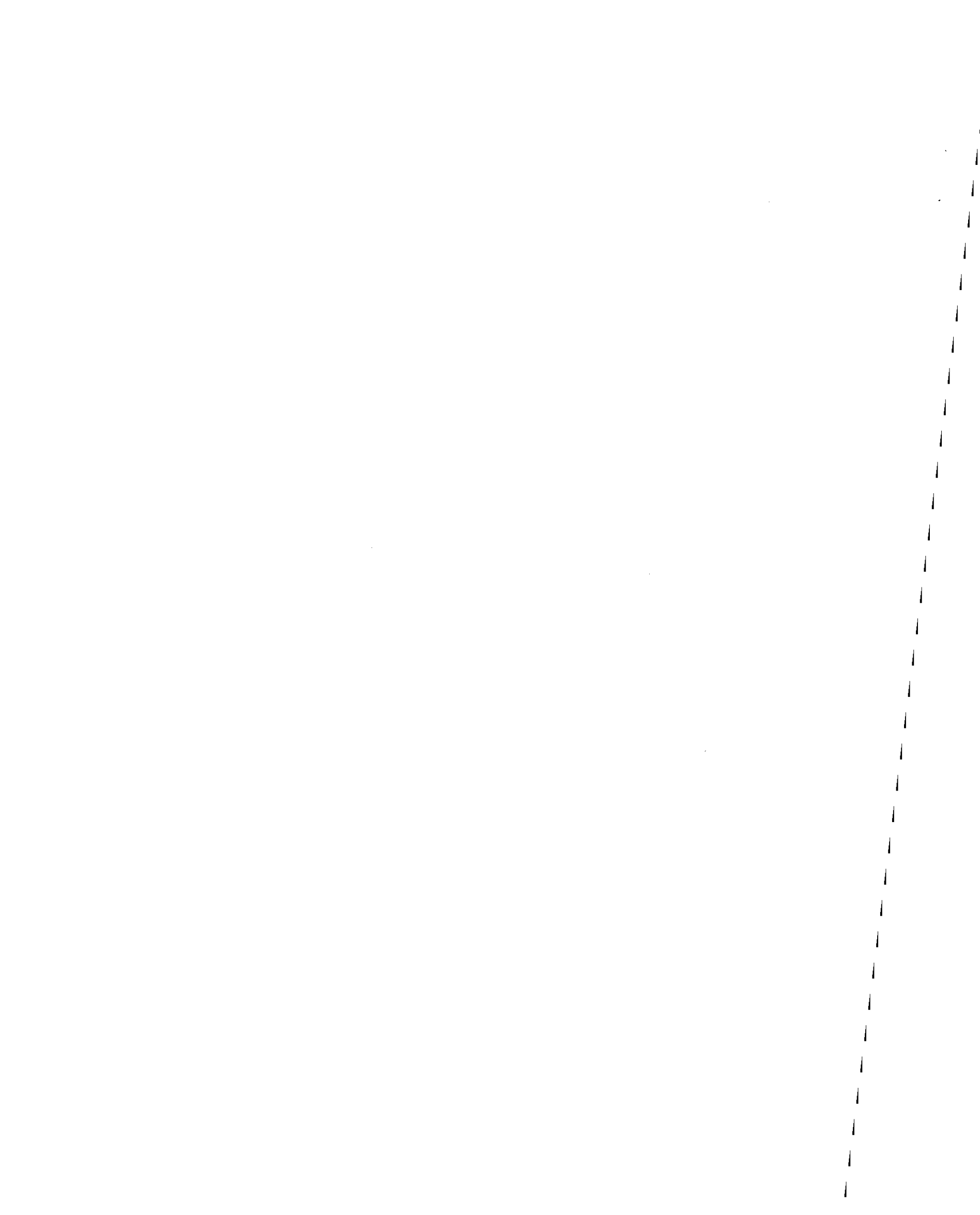


**APPENDIX A -- LIST OF COMMENTERS****Comments**

1. AT&T
2. Association of Communications Enterprises (ASCENT)
3. Competitive Telecommunications Association
4. Qwest
5. United States Chamber of Commerce
6. WorldCom
7. Verizon

**Reply Comments**

1. Association of Communications Enterprises
2. CenturyTel
3. Qwest
4. Verizon



**APPENDIX B – FINAL RULES**

Part 0 of Title 47 of the Code of Federal Regulations is revised as follows:

**PART 0 – COMMISSION ORGANIZATION**

1. Section 0.291(c) is removed, and subsequent sections are re-numbered.

Part 1 of Title 47 of the Code of Federal Regulations is revised as follows:

**PART 1 – PRACTICE AND PROCEDURE**

1. Sections 1.762, 1.765, and 1.766 are removed.

Part 63 of Title 47 of the Code of Federal Regulations is revised as follows:

**PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS**

1. Section 63.01(a) is revised as follows:

**§ 63.01 Authority for all Domestic Common Carriers**

(a) Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.

2. New sections 63.03 – 63.04 are added as follows:

**§ 63.03 Streamlining Procedures for Domestic Transfer of Control Applications**

Any domestic carrier that seeks to transfer control of lines or authorization to operate pursuant to section 214 of the Communications Act of 1934, as amended, shall be subject to the following procedures:

(a) **Public Notice and Review Period.** Upon determination by the Common Carrier Bureau that the applicants have filed a complete application and that the application is appropriate for streamlined treatment, the Common Carrier Bureau will issue a public notice stating that the

application has been accepted for filing as a streamlined application. Unless otherwise notified by the Commission, an applicant is permitted to transfer control of the domestic lines or authorization to operate on the 31st day after the date of public notice listing a domestic section 214 transfer of control application as accepted for filing as a streamlined application, but only in accordance with the operations proposed in its application. Comments on streamlined applications may be filed during the first 14 days following public notice, and reply comments may be filed during the first 21 days following public notice, unless the public notice specifies a different pleading cycle. All comments on streamlined applications shall be filed electronically, and shall satisfy such other filing requirements as may be specified in the public notice.

**(b) Presumptive Streamlined Categories.**

- (1) The streamlined procedures provided in this rule shall be presumed to apply to all transfer of control applications in which: (i) both applicants are non-facilities-based carriers; (ii) the transferee is not a telecommunications provider; or (iii) the proposed transaction involves only the transfer of the local exchange assets of an incumbent LEC by means other than an acquisition of corporate control.
- (2) Where a proposed transaction would result in a transferee having a market share in the interstate, interexchange market of less than 10 percent, and the transferee would provide competitive telephone exchange services or exchange access services (if at all) exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction, the streamlined procedures provided in this rule shall be presumed to apply to transfer of control applications in which:
  - i. neither of the applicants is dominant with respect to any service;
  - ii. the applicants are a dominant carrier and a non-dominant carrier that provides services exclusively outside the geographic area where the dominant carrier is dominant; or
  - iii. the applicants are incumbent independent local exchange carriers (as defined in section 64.1902 of these rules) that have, in combination, fewer than two (2) percent of the nation's subscriber lines installed in the aggregate nationwide, and no overlapping or adjacent service areas.
- (3) For purposes of subparagraphs (1) and (2) of this paragraph, the terms "applicant," "carrier," "party," and "transferee" (and their plural forms) include any affiliates of such entities within the meaning of section 3(1) of the Communications Act of 1934, as amended.

- (c) Removal of Application from Streamlined Processing.** At any time after an application is filed, the Commission, acting through the Chief of the Wireline Competition Bureau, may notify an applicant that its application is being removed from streamlined processing, or will not be subject to streamlined processing. Examples of appropriate circumstances for such

action are:

- (1) an application is associated with a non-routine request for waiver of the Commission's rules;
- (2) an application would, on its face, violate a Commission rule or the Communications Act;
- (3) an applicant fails to respond promptly to Commission inquiries;
- (4) timely-filed comments on the application raise public interest concerns that require further Commission review; or
- (5) the Commission, acting through the Chief of the Wireline Competition Bureau, otherwise determines that the application requires further analysis to determine whether a proposed transfer of control would serve the public interest.

Notification will be by public notice that states the reason for removal or non-streamlined treatment, and indicates the expected timeframe for Commission action on the application. Except in extraordinary circumstances, final action on the application should be expected no later than 180 days from public notice that the application has been accepted for filing.

**(d) *Pro Forma* Transactions.**

- (1) Any party that would be a domestic common carrier under section 214 of the Communications Act of 1934, as amended, is authorized to undertake any corporate restructuring, reorganization or liquidation of internal business operations that does not result in a change in ultimate ownership or control of the carrier's lines or authorization to operate, including transfers in bankruptcy proceedings to a trustee or to the carrier itself as a debtor-in-possession.<sup>160</sup> Under this rule, a transfer of control of a domestic line or authorization to operate is considered *pro forma* when, together with all previous internal corporate restructurings, the transaction does not result in a change in the carrier's ultimate ownership or control, or otherwise falls into one of the illustrative categories found in section 63.24 of this part governing transfers of control of international carriers under section 214 of the Communications Act of 1934, as amended.
- (2) Any party that would be a domestic common carrier under section 214 of the

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<sup>160</sup> "Control" includes actual working control in whatever manner exercised and is not limited to majority stock ownership. "Control" also includes direct or indirect ownership or control, such as through intervening subsidiaries. See 47 C.F.R. § 63.09.

Communications Act of 1934, as amended, must notify the Commission no later than 30 days after control of the carrier is transferred to a trustee under Chapter 7 of the Bankruptcy Code, a debtor-in-possession under Chapter 11 of the Bankruptcy Code, or any other party pursuant to any applicable chapter of the Bankruptcy Code when that transfer does not result in a change in ultimate ownership or control of the carrier's lines or authorization to operate. The notification can be in the form of a letter (in duplicate to the Secretary). The letter or other form of notification must also contain the information listed in sections (a)(1) through (a)(4) in section 63.04 of this part. A single letter may be filed for more than one such transfer of control. If a carrier files a discontinuance request within 30 days of the transfer in bankruptcy, the Commission will treat the discontinuance request as sufficient to fulfill the *pro forma* post-transaction notice requirement.

- (3) Notwithstanding any other provision in this part, any party that would be a domestic common carrier under section 214 of the Communications Act of 1934, as amended, including a carrier that begins providing service through a differently named subsidiary after an internal corporate restructuring, remains subject to all applicable conditions of service after an internal restructuring, such as rules governing slamming and tariffing.

#### **§ 63.04 Filing Procedures for Domestic Transfer of Control Applications**

(a) *Domestic Services Only.* A carrier seeking domestic section 214 authorization for transfer of control should file an application containing:

- (1) the name, address and telephone number of each applicant;
- (2) the government, state, or territory under the laws of which each corporate or partnership applicant is organized;
- (3) the name, title, post office address, and telephone number of the officer or contact point, such as legal counsel, to whom correspondence concerning the application is to be addressed;
- (4) the name, address, citizenship and principal business of any person or entity that directly or indirectly owns at least ten (10) percent of the equity of the applicant, and the percentage of equity owned by each of those entities (to the nearest one (1) percent);
- (5) certification pursuant to 47 C.F.R. sections 1.2001 through 1.2003 that no party to the application is subject to a denial of Federal benefits pursuant to section 5301 of the Anti-Drug Abuse Act of 1988. *See* 21 U.S.C. § 853.
- (6) a description of the transaction;

- (7) a description of the geographic areas in which the transferor and transferee (and their affiliates) offer domestic telecommunications services, and what services are provided in each area;
  - (8) a statement as to how the application fits into one or more of the presumptive streamlined categories in section 63.03 or why it is otherwise appropriate for streamlined treatment;
  - (9) identification of all other Commission applications related to the same transaction;
  - (10) a statement of whether the applicants are requesting special consideration because either party to the transaction is facing imminent business failure;
  - (11) identification of any separately filed waiver requests being sought in conjunction with the transaction; and
  - (12) a statement showing how grant of the application will serve the public interest, convenience and necessity, including any additional information that may be necessary to show the effect of the proposed transaction on competition in domestic markets.
- (b) *Domestic/International Applications for Transfers of Control.* Where an applicant wishes to file a joint international section 214 transfer of control application and domestic section 214 transfer of control application, the applicant should submit information that satisfies the requirements of section 63.18, which specifies the contents of applications for international authorizations, together with filing fees that satisfy (and are in accordance with filing procedures applicable to) both section 1.1105 and section 1.1107. In an attachment to the international application, the applicant should submit the information described in paragraph (a)(6) through (a)(12) of this rule.



**APPENDIX C – FINAL REGULATORY FLEXIBILITY ANALYSIS**

1. As required by the Regulatory Flexibility Act, as amended, (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Declaratory Ruling and Notice of Proposed Rulemaking in CC Docket No. 01-150* (Notice).<sup>2</sup> The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The Commission received seven comments and four reply comments in this proceeding.<sup>3</sup> No comments received addressed the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>4</sup>

**A. Need for, and Objectives of, the Report and Order**

2. The Commission initiated the *Notice* to seek comment on how it might improve and streamline applications under section 214 to acquire domestic transmission lines through acquisitions of corporate control that require little scrutiny in order for the Commission to determine that they serve the public interest. In particular, the Commission sought comment on: (1) whether the Commission should shorten the review period for a predetermined class of domestic section 214 applications; (2) what criteria to employ to determine eligibility for streamlined review; (3) how to treat a streamlined domestic section 214 application that is accompanied by a request for waiver of Commission rules; (4) whether the Commission should have discretion to remove an application from streamlined processing; (5) how the Common Carrier Bureau should treat a streamlined application when the applicants file related applications in other bureaus; and (6) whether the Commission should, as an alternative to streamlining, relieve all non-dominant carriers, or certain categories of non-dominant carriers, that have blanket domestic section 214 authority from filing transfer of control applications.

3. In this Order, the Commission adopts rules to govern and streamline review of domestic section 214 transfer of control applications. By adopting these rules, the Commission intends to reduce the burden on carriers of complying with the Commission's review requirements and, at the same time, increase the predictability and transparency of these requirements.

4. First, under the new streamlined procedures, for example, transactions involving small entities such as incumbent LECs, are presumed to be of the kind not likely to raise public interest concerns and would receive automatic approval after a 30 day review period unless

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket No. 01-150, 16 FCC Rcd 14109 (2001) (*Notice*).

<sup>3</sup> Initial comments were filed by AT&T, Association of Communications Enterprises (ASCENT), Competitive Telecommunications Association, Qwest, the United States Chamber of Commerce, WorldCom, and Verizon. Reply Comments were filed by ASCENT, CenturyTel, Qwest, and Verizon.

<sup>4</sup> See 5 U.S.C. § 604.

otherwise notified by the Commission. This streamlined approach reduces the amount of business and legal resources an applicant may need to expend to manage an application through the Commission review process because applicants can now predict the level of scrutiny an application is likely to receive. The streamlined approach also offers small entities the benefit of business certainty by designating a date certain on which transactions would be permitted to close.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

5. No party specifically commented in response to the Regulatory Flexibility Act. However, commenters proposed many of the streamlined measures we enact today. For example, in this Order, we adopt commenters' proposals to presumptively streamline transfer applications involving domestic, interstate carriers that are non-dominant in the provision of any service where their combined post-transaction market presence is unlikely to raise public interest concerns.<sup>5</sup> If a transaction proposes to combine the interexchange services of two non-dominant carriers, the application will be presumptively streamlined if the transferee's market share in the interstate, interexchange market following the transaction would be less than 10 percent.<sup>6</sup> Similarly, if a transaction proposes to combine the telephone exchange services and/or exchange access services of two non-dominant carriers, the application will be presumptively streamlined if their services are offered exclusively in geographic areas served by a dominant local exchange carrier. These adopted streamlining measures proposed by commenters, while not directly responsive to the Regulatory Flexibility Act, will nevertheless benefit both small and large carriers.

**C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply**

6. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.<sup>7</sup> The RFA defines the term "small entity" as having the same meaning as the terms "small business,"

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<sup>5</sup> AT&T Comments at 13; ASCENT Comments at 1-9; CompTel Comments at 4; Verizon Comments at 7-8; WorldCom Comments at 6-10; Qwest Reply Comments at 3.

<sup>6</sup> Our presumption in favor of streamlining for transactions that result in less than 10 percent market share is based upon guidelines suggesting that total combined market shares of less than 10 percent in markets that are "moderately concentrated" – or even "highly concentrated" – are "unlikely to have adverse competitive consequences and ordinarily require no further analysis." In our view, such combinations should merit a careful, although streamlined review. See U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, Section 1.51, n 18 (DOJ/FTC Merger Guidelines); see Qwest Comments at 2 (stating that Qwest opposes the "import [of] additional notions from the DOJ/FTC premerger notification process" into Commission review of section 214 applications).

<sup>7</sup> 5 U.S.C. § 604(a)(3).

"small organization," and "small governmental jurisdiction."<sup>8</sup> The term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.<sup>9</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>10</sup>

7. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Provider Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).<sup>11</sup> According to data in the most recent report, there are 5,679 interstate service providers.<sup>12</sup> These providers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

8. We have included small incumbent local exchange carriers (LECs)<sup>13</sup> in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>14</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.<sup>15</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this

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<sup>8</sup> 5 U.S.C. § 601(6).

<sup>9</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.*

<sup>10</sup> 15 U.S.C. § 632.

<sup>11</sup> FCC, Common Carrier Bureau, Industry Analysis Division, *Telecommunications Provider Locator*, Tables 1-2 (November 2001) (*Provider Locator*). See also 47 C.F.R. § 64.601 *et seq.*

<sup>12</sup> *Provider Locator* at Table 1.

<sup>13</sup> See 47 U.S.C. § 251(h) (defining "incumbent local exchange carrier").

<sup>14</sup> 15 U.S.C. § 632.

<sup>15</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

9. *Total Number of Telephone Companies Affected.* The U.S. Bureau of Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>16</sup> This number contains a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."<sup>17</sup> It seems reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by these rules.

10. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>18</sup> According to the SBA's definition, a small business telephone company other than a radiotelephone (wireless) company is one employing no more than 1,500 persons.<sup>19</sup> All but 26 of the 2,321 non-radiotelephone (wireless) companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Even if all 26 of the remaining companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone (wireless) companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Therefore, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone (wireless) companies are small entities or small incumbent LECs that may be affected by these rules.

11. *Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers.* Neither the Commission nor the SBA has developed a definition for small LECs, competitive access providers (CAPS), interexchange carriers (IXCs), operator service providers (OSPs), payphone providers, or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>20</sup> The

<sup>16</sup> U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

<sup>17</sup> See generally 15 U.S.C. § 632(a)(1).

<sup>18</sup> 1992 Census at Firm Size 1-123.

<sup>19</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 513310, 513330, and 513340.

<sup>20</sup> 13 C.F.R. § 121.201, NAICS codes 513310, 513330, and 513340.

most reliable source of information that we know regarding the number of these carriers nationwide appears to be the data that we collect annually in connection with the TRS.<sup>21</sup> According to our most recent data, there are 1,329 LECs, 532 CAPs, 229 IXC's, 22 OSPs, 936 payphone providers, and 710 resellers.<sup>22</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under the SBA's definition. Therefore, we estimate that there are fewer than 1,329 small entity LECs or small incumbent LECs, 532 CAPs, 229 IXC's, 22 OSPs, 936 payphone providers, and 710 resellers that may be affected by these rules.

12. *Wireless Telephony and Paging and Messaging.* Wireless telephony includes cellular, personal communications services (PCS) or specialized mobile radio (SMR) service providers. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees, or to providers of paging and messaging services. The closest applicable SBA definition is a telephone communications company other than radiotelephone (wireless) companies.<sup>23</sup> According to the most recent Provider Locator data, 858 carriers reported that they were engaged in the provision of wireless telephony and 576 companies reported that they were engaged in the provision of paging and messaging service.<sup>24</sup> We do not have data specifying the number of these carriers that are not independently owned or operated, and thus are unable at this time to estimate with greater precision the number that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 858 small carriers providing wireless telephony services and fewer than 576 small companies providing paging and messaging services that may be affected by these rules.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

13. The streamlining requirements discussed herein will not require additional reporting, recordkeeping or compliance requirements for service providers. In this Order, we are not mandating new recordkeeping and compliance requirements. Rather, we are articulating more clearly the categories of information that must be contained in a domestic section 214 application for transfer of control in order for the Commission to grant streamlined review. While there has been some uncertainty concerning the appropriate content of a section 214 application, we believe that these new requirements will lessen the regulatory burden on small carriers.

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<sup>21</sup> See 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

<sup>22</sup> *Provider Locator* at Table 1. The total for resellers includes both toll resellers and local resellers.

<sup>23</sup> 13 C.F.R. § 121.201, NAICS codes 513321 and 513322.

<sup>24</sup> *Provider Locator* at Table 1.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>25</sup>

15. We conclude that measures adopted and described in this Order would reduce regulatory burdens for small carriers including resellers and small incumbent LECs. For example, in this Order, we ease filing burdens by adopting rules that enable carriers to file a single document with the Commission that combines both domestic and international section 214 applications. Aside from cases involving bankruptcy, where a simple notice will be required, we eliminate filing requirements for *pro forma* transactions. The same categories of *pro forma* transactions that apply in other bureaus will apply to domestic carriers, thus improving consistency of filing requirements across bureaus for small and large entities alike. As we describe in Section D above on projected reporting, record keeping, and other compliance requirements, carriers have sometimes found the filing rules confusing, cumbersome, and overly burdensome to navigate because the rules did not state what information the Commission required. In this Order, we clarify what a carrier must submit to be eligible for streamlined treatment. Overall, the steps we take in this item will add predictability, efficiency, and transparency to the Commission's review process, and will vastly improve our current transfer of control procedures. While these streamlining measures apply similarly to both small and large entities, we expect that small entities are more likely to benefit to the extent such firms have fewer or reduced resources available, as compared to large firms.

16. In this Order, we also describe commenters' alternative streamlining proposals and state why those proposals would not improve efficiency or predictability, or would not serve the public interest.<sup>26</sup> For example, CenturyTel proposed that "after the fact" notice for corporate transfers of control by small and medium-sized carriers would serve the public interest.<sup>27</sup>

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<sup>25</sup> 5 U.S.C. § 603(c).

<sup>26</sup> See Sections V.A and V.B.

<sup>27</sup> CenturyTel proposes an "after the fact" notice procedure wherein applicants would file only "*pro forma* notices" giving the Commission notice of the transaction within 30 days *after* closing the transaction. CenturyTel states that "[t]he transaction would then be deemed approved unless the Commission were to take contrary action." CenturyTel Reply Comments at 5. This model would apply only to small and mid-sized carriers because, according to CenturyTel, the limited size and nature of such transactions do not trigger public interest concerns "Mid-sized incumbent local exchange carriers" are those carriers whose operating revenue equals or exceeds the "indexed revenue threshold" and whose revenue when aggregated with the revenues of any local exchange carrier that it (continued....)

However, as we point out in this Order, the Commission must fulfill its statutorily imposed duty to determine whether the transaction serves the public interest, notwithstanding the legitimate desire of applicants to obtain the most expedited review possible. Therefore, we conclude that applicants shall continue current practice and provide the Commission prior notice of proposed transfers of control to permit a short period for comment and review, even in the context of streamlined processing of domestic section 214 applications. Moreover, we gain assurance from knowing that the rule would continue to benefit small carriers and serve the public interest by providing applicants with a date certain for domestic transfers of control, after which every transaction may close, unless the Commission otherwise notifies the applicant.<sup>28</sup>

17. *Report to Congress.* The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>29</sup> In addition, the Commission will send a copy of this Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this Order and FRFA (or summaries thereof) will

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controls, is controlled by, or with which it is under common control, is less than \$7 billion. CenturyTel Comments at 3-5; WorldCom Comments at 7.

<sup>28</sup> Qwest Comments at 6.

<sup>29</sup> See 5 U.S.C. § 801(a)(1)(A).

also be published in the Federal Register.<sup>30</sup>

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<sup>30</sup> See 5 U.S.C. § 604(b).

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS,  
APPROVING IN PART, DISSENTING IN PART**

*Re: Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations.*

I support efforts to make our merger review more efficient and streamlined. Applicants have a right to expect an expeditious resolution. We must recognize, however, that Congress directed the Commission to ensure that acquisitions, including transfers of control, serve the public convenience and necessity. If the Commission fails to carry out this directive, it violates its responsibility under the Act.

I support establishing presumptive categories for streamlined merger review. I would also have been open to a process in which Commissioners could decide whether to accord streamlined treatment in other cases without additional burden or delay to the parties. But that is not the choice I was given. Rather, the majority has decided to vest the Bureau with the delegated authority to determine if any transaction -- whether or not it falls within the presumptive categories -- merits streamlined treatment or requires further investigation.

I do not support such an expansion of the Bureau's delegated authority. This position is not a reflection on the job the Bureaus do. We look to the staffs of the Bureaus for their expertise and judgment and I will continue to rely very heavily on the analysis and judgments of the truly excellent teams in the Bureaus. But mergers may be some of the most important and consequential cases that the Commission will be handling in this time of great economic change and uncertainty, and I believe that for these transactions, the buck must stop in the Commissioners' offices. By establishing presumptive categories, but then allowing the Bureau to decide in all instances on a case-by-case basis whether to streamline review of a transaction, the Commission abdicates an important part of its responsibility.

The Order points out that other Bureaus have greater delegated authority and that they conduct streamlined reviews under that authority. Although I do not believe that domestic wireline common carriers should be subjected to greater scrutiny by the Commission than other telecommunications providers, I do believe that before we expand the authority delegated to the Bureaus, we should examine the experience we have seen to date in the merger context. It may be that, in the area of merger review, we need a little less delegation. In the past year alone, one Bureau approved a merger involving a sizeable increase in foreign ownership without public notice or comment.<sup>1</sup> Another Bureau approved dozens of transactions last March that

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<sup>1</sup> *General Electric Capital Corporation, Transferors, SES Global, S.A., Transferees for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214(a) and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Supplemental Order, October 26, 2001.*

substantially increased the ownership concentration in small radio markets. All of these were done, I am told, without Commissioner input. I think both Congress and the American people want us to step up to the plate on important issues such as this.

So, I will agree where I can on the establishment of presumptive categories, and dissent where I must on the Bureau deciding cases outside the presumptive categories.